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Supreme Court of the United States

October Term, 1959.

No. 728

R. P. FARNSWORTH & CO., INC.
Petitioner

versus

TRI-STATE CONSTRUCTION COMPANY et al.
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINION BELOW and JURISDICTION

The case was tried to a jury, which found adversely to petitioner.

The Court of Appeals for the Fifth Circuit rendered its opinion, Judge Cameron dissenting, on October 27, 1959.

affirming the judgments entered on the verdict. The opinion of the Court of Appeals is reported at 271 F2d 728, and is printed in the Appendix hereto.

The Court of Appeals refused a petition for a rehearing on December 1, 1959, Judge Cameron dissenting. Jurisdiction of this court lies under 28 USC 1254.

QUESTION PRESENTED

May judgments of a federal district court entered on a jury verdict be affirmed on appeal despite the fact that the trial court:

a—Gave all charges requested by all of the parties, including charges which were erroneous and mutually irreconcilable on vital questions presented for determination by the jury;

b—Instructed the jury to construe and determine the legal effect of the contract documents;

c—Permitted counsel to argue his legal contentions to the jury; and

d—Interjected comments in the charges of the losing party which emphasized the contentions of the prevailing parties?

The ground for this petition is that the Court of Appeals has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings in the federal courts as to call for an exercise of this court's power of supervision.

In its FELA line of decisions, this court has made it clear that in federal jury trials the constitutional division of function between court and jury must be strictly respected.

That line of decisions is occupied chiefly with the problem of encroachment by the court on the jury's sphere of authority. But parties to a lawsuit are equally entitled to effective discharge by the court of its own proper role.

Another panel of the Fifth Circuit itself recently recognized that "'it is of the genius of our institutions that (jury trials) be conducted under the firm and steady guidance of judges as administrators, who, having minds trained and personalities adequate to the task, are held primarily responsible for their just outcome . . . His (the trial judge's) chief function, his primary object, is to keep the case within legal bounds by admonitions and rulings from its beginning to its end . . . (A) trial judge may never abdicate his function, or surrender to counsel the conduct of the trial.'" *Theriot vs. Mercer*, 262 F2d 754, 756 (1959), cert. den., 359 US 983.

The circumstances of this case appear to raise serious question, within the appropriate purview of this court's supervision, whether the Court of Appeals has not here approved what it there condemned—the abondonment by the trial judge to counsel of the task of instructing the jury, and the abandonment to the jury itself of the task of selecting applicable legal principles and construing written contracts, at the same time injecting his own in-

fluence in the trial to emphasize the contentions of one of the parties.

STATEMENT OF THE CASE

Petitioner, a large New Orleans company, was general contractor for erection of a Capehart housing project[1] for the United States Government at Fort Stewart, Georgia. Petitioner contracted to erect seventy-four multiple-unit dwellings, employing conventional construction means, that is, construction on the site from raw materials, utilizing no prefabricated panels.

Thereafter, American Houses, Inc. interested petitioner in using its prefabricated panel units, and introduced Tri-State Construction Company as a local Georgia contractor experienced in installing American's prefabricated materials.[2]

The Corps of Engineers, representing the United States, was persuaded to accede to prefabrication type of construction. Petitioner, Tri-State and American then entered into integrated agreements in March 1957, consisting of a subcontract and an annexed purchase order.

The subcontract between petitioner and Tri-State provided in capital letters that no extras would be allowed

[1] Under 12 USC 1748 *et seq.*

[2] Tri-State was brought into the picture by American because petitioner insisted that it would consider installation of prefabricated units only if American would agree to "a contract which would provide the components (installed) in place" (R. 148, 447-45, 1178-79).

except on petitioner's written order[3] (Plaintiff's Exhibit 2, R 1461, R 116). It also provided that it "is awarded in conjunction with . . . a purchase order to American Houses, Inc. . . . a copy of which is attached hereto and made a part of this subcontract".

The purchase order from petitioner to American bound American "to provide materials . . . as outlined below, complete and in such quality and quantity to make these items of work whole and complete in every respect to the true intent and meaning of the plans and specifications". It also stated that petitioner "has entered into a subcontract with Tri-State . . . (copy of which contract is attached hereto)" (Plaintiff's Exhibit 2, R 1464, R 116).

In the purchase order, American, in event of Tri-State's default, further undertook to "provide and arrange for another subcontractor to complete the work, at no additional cost" to petitioner and subject only to approval of Tri-State's surety (Plaintiff's Exhibit 2, R 1464, R 116).

American confirmed the Tri-State subcontract, its own purchase order and their integration, by a letter to petitioner in which it agreed that the subcontract and purchase order "are complementary and intended to inte-

[3] The provision in question read as follows:

"4(a) Subcontractor shall make all alterations, furnish materials for and perform all extra work or omit any work Contractor may require without nullifying this agreement, at a reasonable addition to or deduction from the contract price hereinafter set forth and pro rata to the same. HOWEVER, NO ALTERATIONS OR CHANGES SHALL BE MADE EXCEPT UPON CONTRACTOR'S WRITTEN ORDER. The amount to be paid by Contractor or allowed by Subcontractor, as a result of such changes or alterations, shall be stated in such order."

grate in such a way as to produce a finished product of all the items shown on plans and specifications . . . and if any deficiency in materials necessary to complete the work in accordance with said plans and specifications shall arise, we will see to it that such deficiency will be supplied" (Defendant's Exhibit 22, R 1468, R 447).

American and Tri-State entered into a separate agreement, to which petitioner was not a party, covering the furnishing of materials by American, in which American warranted to Tri-State that the materials would be "acceptable as delivered for erection by organized labor" (Defendant's Exhibit 4, R 151).

Petitioner agreed to pay American $860,178 for the materials, and to pay Tri-State $191,466 for their erection.

Tri-State worked for several months under this arrangement, but defaulted on September 25, 1957, and finally abandoned the job completely on October 4. American failed to substitute another subcontractor, and petitioner had to finish erecting the units itself, incurring substantial extra costs.

Several months before the project was completed, Tri-State commenced this litigation by suing petitioner for an alleged balance for contract and extra work. Tri-State based its cause of action on the theory that its abandonment of the work was justified by American's failure to furnish proper materials and to pay certain sums which it owed Tri-State, as well as by petitioner's failure to pay Tri-State for alleged extra work (R 15-17, 1302, 1394).

Petitioner counter-claimed against Tri-State and its surety for damages caused by Tri-State's default. Petitioner also filed a third-party action against American and its surety because American had failed to comply with its agreement to furnish a substitute subcontractor after Tri-State's default, and because Tri-State's suit against petitioner was based in part on American's failure to make proper deliveries of materials to Tri-State.

American then counter-claimed against petitioner for unpaid materials (which petitioner claimed as setoffs against damages caused by Tri-State's default and American's failure to provide materials and a substitute subcontractor), and cross-claimed against Tri-State for indemnity for any sums which petitioner might recover from it.

Near the close of the trial each party submitted requests for instructions.[1] At the conclusion of the evidence the jury was withdrawn and the judge discussed with counsel the charge he would give. He read into the record the preliminary portion of the proposed charge and then said: "Now, I come to your requests on both sides, and I am going to follow them pretty well. I usually do" (R 1245).

The judge then read into the record all of the requested charges. While reading those requested by petitioner, the judge indicated orally that he was making certain in-

[1] Petitioner's Requests Nos. 1 through 22 and 1-A (R 1359-74); Tri-State's Requests Nos. 1 through 6 (R 1388-94); American's Requests Nos. 1 through 4 (R 1386-88); and Requests by American Surety Nos. 1 through 3 (R 1382-85).

sertions (R 1252, 1259, 1262). In concluding his remarks, the judge stated: "Everything that I have read today, I am going to charge tomorrow" (R 1272).

The case was then argued to the jury. Tri-State's counsel was permitted over objection (R 1277), to make extensive arguments concerning portions of the charge the court had stated would be given (R 1273-80), and was even allowed to cite and summarize decisions from an open book of Georgia Reports (R 1276-78) and to read an excerpt from American Jurisprudence (R 1279-80).

The next morning the judge read his entire charge to the jury, including all charges requested by each of the parties, with certain interjections in the charges requested by petitioner (R 1281).

Petitioner objected in detail to all charges given in behalf of Tri-State, and to certain charges given in behalf of its surety and American, on the ground that they were erroneous and that they contradicted the charges requested by petitioner.[5]

Petitioner objected also to the side remarks and interjections of the court which emasculated and detracted from petitioner's requested charges (R 1341-42).

The court "overruled each and every exception made by either side" and "let the charge stand as given to the jury" (R 1344).

[5] R 1334-44. Tri-State objected to petitioner's charges on the ground that they contradicted Tri-State's charges. R 1327-28.

The jury returned a verdict in favor of Tri-State against petitioner for $133,020.80 and in favor of American against petitioner for $151,142.35 (R 1346-47).

ARGUMENT

A

Trial Court Errors

1—Erroneous and Conflicting Charges

a

The federal appellate courts have repeatedly recognized the erroneous and prejudicial nature of contradictory charges.[6] In the words of the Eighth Circuit, when "instructions were conflicting" they were "therefore erroneous" (*Voss vs Becko*, 192 F2d 827, 830 (CA 8-1951)), because "it is the duty of the jury to accept as the applicable law that given by the court and no other".

[6] During argument on motions for a new trial the trial court finally recognized that the charges requested by opposing parties were contradictory and confusing, but erroneously took the position that he had not given all of the requested charges: "Mr. Kaskell: . . . I believe the court gave all the requests for charges made by all parties.

"The Court: Some I did not. There was such a confliet.

"I didn't give them all . . .

"I couldn't charge what your contention was so directly opposite of what the other side was, because the jury wouldn't have understood what I was trying to tell them.

"Mr. Kaskell: I believe the record will show that all of these charges were charged and there was contradiction—

"The Court—(Interposing) It would have been if I had charged all of them." (R 1412-13.)

Glendenning Motorways vs Anderson, 213 F2d 432, 435 (CA 8-1954).[7]

The Sixth Circuit has pointed out that "the difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and secondly, it is impossible after verdict to ascertain which instruction the jury followed". *Standard Life & Accident Ins. Co. vs Sale*, 121 Fed. 664, 669 (1903).

In the case at bar the Court of Appeals acknowledged that the trial court "gave all of the charges requested by the parties and that resulted in some conflict, a practice certainly not to be approved" (271 F2d at 737; Appendix at page 38). That court excused this error, however, on the ground that petitioner's charges were erroneous and those of Tri-State and American proper, so that petitioner could not complain.

References to the charges on two crucial issues demonstrate the error of this view. It will be recalled that the whole theory of Tri-State's case was that it was justified in abandoning work under its contract with petitioner, and was entitled to damages from petitioner, because (1) American failed to deliver proper materials and American failed to pay moneys it owed to Tri-State, and (2) petitioner failed to pay Tri-State for extra work.

[7] Accord: *Zumwalt vs Gardner*, 160 F2d 298 (CA 8-1947); *Midcastern Contracting Corp. vs O'Toole*, 55 F2d 909 (CA 2-1932); *J. H. Sullivan Co. vs Wingerath*, 203 Fed. 460 (CA 2-1913).

b

In connection with the first ground, the trial court, at Tri-State's request, instructed the jury that "in the event you should find that Tri-State has incurred additional expense for labor or materials as the *sole and direct result* of the *failure of American Houses to furnish materials* . . . Tri-State would be entitled to recover any such expense from the defendant Farnsworth (petitioner) . . ." (R 1302).

The trial court next instructed the jury that "in the event you should find that Farnsworth or *American Houses* has *failed to perform work or to furnish materials* which they were obligated to furnish or perform . . . and . . . such failure or default . . . caused or materially contributed to the failure or inability of Tri-State Construction Company to complete the performance of its subcontract . . . then and in such event neither Farnsworth nor American Houses would be entitled to recover from . . . Tri-State" (R 1319).

The trial court went on to instruct the jury that "in the event you find that Farnsworth or *American Houses was indebted to Tri-State* Construction Company for work done on said job and wrongfully refused to pay Tri-State for such work and thereby caused or contributed to the inability of Tri-State to complete performance of said contract . . . then and in that event neither Farnsworth nor American Houses would be entitled to recover from . . . Tri-State" (R 1320).

These three charges completely contradicted those given at the request of petitioner,[9] and made petitioner the guarantor of American's contract and monetary obligations to Tri-State. The first charge actually authorized imposition on petitioner of Tri-State's damages from American's failure to furnish proper materials. The last two charges denied petitioner any recovery from Tri-State if American failed to furnish proper material or was indebted to Tri-State.

These charges find no support in the contract documents or elsewhere in the record.

In their opinion, the majority of the Court of Appeals discuss these three charges, but make no attempt to justify their imposition of this indemnity obligation on petitioner. The majority sustains the charges on the sole basis that "Tri-State did not guarantee, nor become responsible for, American's performance" (271 F2d at 726; Appendix at page 34), which is no justification at all for charges holding that petitioner guaranteed American's performance and indebtedness to Tri-State.

c

The second basic element of Tri-State's claim was petitioner's failure to pay for alleged extra work.

As stated, the agreement between petitioner and Tri-State expressly specified that no payment for extra

[9] These charges were in no manner related to the asserted supplemental agreement for extras.

[10] Appendix pages 40-42. See also petitioner's other requested charges (R 1359-71).

work would be made except on petitioner's prior written change order. At petitioner's request, the trial court correctly charged the jury that this provision could be waived, but that it was necessary to establish any such waiver "by the preponderance of the evidence, so that the burden is on Tri-State to show that Farnsworth waived such provision" (R 1360, 1307). See *Lord Constr. Co. vs United States*, 28 F2d 340 (CA 3-1928); *United States vs Henke Constr. Co.*, 157 F2d 13 (CA 8-1946).

The trial court destroyed entirely the effect of this charge by giving Tri-State's requested instruction that "if you find that Tri-State Construction Company has performed services in the form of labor and materials in behalf of and at the instance of the defendant Farnsworth and that these services were received and accepted and were of a benefit to the defendant Farnsworth . . . then and in that event, you gentlemen shall determine the reasonable value of the labor and materials furnished, and return a verdict in favor of Tri-State" (R 1300-1301).

This latter charge completely dispensed with Tri-State's burden of proving a waiver of the requirement of written change orders.

The Court of Appeals approved the charge on the basis of a Georgia statute and two Georgia decisions, which relate to typical *quantum meruit* situations and have no bearing on a transaction involving a contract which expressly makes written change orders prereq-

uisite to payments for extra work (271 F2d at 737; Appendix at page 37).

d

It is abundantly clear that the trial court delivered charges which were erroneous, and which conflicted with correct charges requested by petitioner, on each of the two essential grounds for the verdicts against petitioner.

Instead of assuming its role as selector of the legal principles to be applied in the case, the trial court shifted this task to the jury by giving all charges requested by all parties, thus leaving the jury in a welter of conflicting rules, and rendering it impossible to determine how the jury resolved the factual issues presented.

The court's mismanagement of the instructions to the jury brought about prejudice and confusion[10] that do not exist in a fair trial.

2—Contract Interpretation by Jury

It is the obligation of the court to instruct the jury as to the legal effect of written instruments.[11]

[10] During the trial one of the jurors had said: "We are confused enough as it is. We have had a full treatment of it, Judge, I guarantee you that" (R 919).

[11] *City of Orlando vs Murphy*, 84 F2d 531 (CA 5-1936); *O'Brien vs Elder*, 250 F2d 275, 278 (CA 5-1958); *Knight vs Causby*, 23 SE2d 458 (Ga. App.-1942); *Loftis Plumbing & Heating Co. vs American Surety Co.* 40 SE2d 667 (Ga. App.-1946); *Ben-*

The trial court in this case, however, charged the jury that "the court has not attempted to outline the contents of these contracts to you, but you are instructed to refer to them directly in order to determine for yourselves their contents and the duties and obligations imposed upon the respective parties" (R 1298).

The contract documents were at the very bottom of the disputes among the parties, and the parties were in sharp disagreement as to the proper meaning of the documents, as evidenced by the requested conflicting charges.

The trial court would have been justified in submitting the contracts to the jury for the purpose of determining the meaning of the words "pilot house" and "shop drawings". There was, however, no limiting language in this charge (R 1298) and the contracts were not given to the jury merely to determine the meaning of any such technical words.

The Court of Appeals conceded that "the construction of the written contracts was, of course, for the court", but the Court of Appeals condoned the charge on the ground that the contracts were submitted to the jury "in order for the jury to see their contents" (271 F2d at 733; Appendix at page 28).

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nett vs Dove, 90 SE2d 601 (Ga. App.-1955). "The court cannot devolve its duty of construing written instruments upon the jury merely because its performance involved possible difficulty." *General Motors Corporation vs Abell*, 292 Fed. 922, 926 (CA 1-1923). Accord: *Drainage Dist. No. 1, vs Rude*, 21 F2d 257, 262 (CA 8-1927).

There could be no reason for the jury to examine the contents of the contracts unless they were to draw conclusions therefrom, including "the duties and obligations imposed on the respective parties" (R 1298), as the erroneous charge in question expressly instructed them to do.

3—Legal Argument to Jury

Not content with serving as a mere conduit of instructions from counsel to jury, the trial court compounded the resultant confusion by permitting counsel for Tri-State, over petitioner's objection (R 1277), to argue to the jury the legal merits and demerits of the charges. Counsel was further permitted to give verisimilitude to his argument by reading to the jury from two lawbooks (R 1274-78).

This court has held that "it is the province of the court to instruct the jury as to the principles of law affecting the case, and counsel cannot appeal to a jury to decide legal questions by reading cases to them". *Roberts vs Cooper*, 61 US 467, 481 (1857). See *Glendenning Motorways vs Anderson*, 213 F2d 432 (CA 8-1954).

The Court of Appeals brushed aside this error without discussion (271 F2d at 738; Appendix at page 38).

4—Prejudicial Comments

a

The trial judge did not in any way vary the charges requested by Tri-State, American or their sureties (R 1298-1302, 1317-21, 1382-94). But seven times during the reading of petitioner's requested charges the judge interjected the contentions of the opposing parties.[12]

One or two of the interjections were not even pertinent to the charges to which the additions were made, but served merely to emphasize an important Tri-State contention.[13] In one of petitioner's charges the judge interjected Tri-State's theory three times.[14] The judge also indicated his approval of the legal contentions stated in Tri-State's closing argument to the jury (R 1275-76, 1279).

All of this was clear infringement of the rule that in charging the jury the trial court should "avoid undue emphasis of issues, theories or defenses by repeti-

[12] See Appendix at pages 43-44.

[13] For example, petitioner's Request No. 9 stated that under the provisions of the subcontract (Sec. 3(d), R 1461), if petitioner delayed Tri-State's work, Tri-State would not be entitled to damages for the delay but to an extension of time equal to the delay (R 1311). The court added: "Tri-State, of course, contends that it . . . was forced to leave the job by Farnsworth . . ." (R 1311). Petitioner's Request No. 6 stated that petitioner was entitled to get everything set forth in the contract and that nothing to be done under the contract itself could be considered an extra (R 1362-63). The court added: "I think I charged you in different words as to that, as to the parol agreement and the written agreement. I think I charged you specifically as to that" (R 1310).

[14] See Appendix at page 44, paragraph 6.

tion or by giving them undue prominence or by minimizing the importance of others".[15]

The Court of Appeals found, without discussion, that no error had been committed (271 F2d at 738; Appendix at page 38).

B

The Writ Should Issue

This court, like another panel of the Fifth Circuit whose opinion is quoted under *Question Presented* above, has held that "in a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides". *Herron vs Southern Pacific Co.*, 283 US 91, 95 (1931).

Mr. Justice Harlan has noted that "it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation". *Rogers vs Missouri Pacific Railway Co.*, 352 US 500, 564 (1957), concurring opinion.

[15] *White Auto Stores vs Reyes*, 223 F2d 298, 305 (CA 10-1955); *Howard vs Cincinnati Sheet Metal and Roofing Co.*, 234 F2d 233 (CA 7-1956).

Mr. Justice Frankfurter has stated that "trial by jury as guaranteed by the Constitution of the United States and by the several States pre-supposes a jury under proper guidance of a disinterested and competent trial judge". *Wilkinson vs McCarthy*, 336 US 53, 64 (1949), concurring opinion.

This case presents the reverse side of the coin whose obverse has been burnished by this court's repeated examination of cases in which the jury was not permitted to pass on fact questions.

Here, not dominating the jury or usurping its functions, the judge so far forgot his own authority as to abdicate completely to counsel the task of instructing the jury on the law, and to the jury the task of choosing among the contradictory legal principles presented to it, and of construing the legal effect of the contract documents. The judge's passivity in the role in which he should have asserted himself, further served to emphasize the prejudicial effect of his improper interjections in the charges requested by petitioner.

It is respectfully submitted that the record in this case presents a substantial distortion, to petitioner's prejudice, of the balance between court and jury which the Constitution commands; and that the condonation of this unfair trial by the Court of Appeals provides an appropriate question whether, in the exercise of this court's "supervisory powers over the lower federal courts, the judgment of the Court of Appeals should be

reversed in the interest of justice". *Gibson vs Lockheed Aircraft Co.*, 350 US 356, 357 (1956).

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February, 1960

OPINION OF THE COURT OF APPEALS

RIVES, Chief Judge: This appeal is from two judgments entered upon a jury's verdict against R. P. Farnsworth & Co., Inc.,[1] one in favor of Tri-State Construction Company[2] for the sum of $133,020.80, and the other in favor of American Houses, Inc.,[3] for the sum of $151,142.35. The trial in the district court consumed ten full days, and the record on appeal comprises 1474 printed pages plus many original exhibits.

Farnsworth had entered into a contract with the United States for the erection of a family housing project[4] at Fort Stewart, Georgia, under which Farnsworth would be paid a total of $6,230,100.00. This contract, dated February 27, 1957, contemplated the erection of seventy-four multiple-unit dwellings—forty of one type and thirty-four of another type. The original contract called for conventional construction, that is, construction on the site from raw materials with no prefabricated parts.

American interested Farnsworth in using American's prefabricated units, and introduced Tri-State as a local contractor experienced in installing American's prefabricated materials. The Corps of Engineers, represent-

1 Hereinafter called Farnsworth.
2 Hereinafter called Tri-State.
3 Hereinafter called American.
4 Under 12 U.S.C.A. §1748, et seq.

ing the United States, agreed to the switch over from conventional to prefabrication type of construction, provided show drawings were submitted showing how this was to be accomplished and "pilot"[5] buildings were erected.

Under date of March 18, 1957, Farnsworth and American entered into a contract designated as a "Purchase Order," whereby American would provide the carpentry materials to the job, after they had been prefabricated at its plant, at a total price of $860,178.00. As of the same date, Farnsworth and Tri-State entered into a contract whereby Tri-State was to erect the carpentry materials on the job at a price of $191,466.30. Mr. McMaster, Farnsworth's construction engineer on the job, testified that a fair approximation would be that one-fifth of the work on the job would be done by Tri-State and American and the remaining four-fifths by Farnsworth or by other subcontractors.[6]

---

[5] The project engineer explained:

"The idea of the pilot building—I mean if it had been regularly constructed we would have put every floor joist where it was shown and every stud where it was shown and so forth, but when they went into prefabrication in making up panels they ran into a little different deal, and what we wanted to see was how these panels were going to fit together while they were being cut and fitted in the field, let us say; in that pilot building so that we could take care of any little discrepancy and so forth, which we would do if you are cutting boards, you would cut them the right length to fit, wouldn't you. So, all of this stuff came in already made up and so we knew that there were going to be some wrinkles to iron out, and so that is the reason we wanted a model house to see where they were and what they were."

[6] It may be observed that the combined contract prices for the work of American and Tri-State was slightly more than one-sixth of Farnsworth's total contract price.

One of the principal points of controversy is the extent, if any, of the responsibility of Tri-State for performance by American, and of American for performance by Tri-State. Farnsworth's position, with which Tri-State and American do not agree, is that the contracts between Farnsworth, Tri-State and American were integrated and complementary and that Tri-State and American together agreed to provide Farnsworth with a finished product, complete and in place, in accordance with the contract between Farnsworth and the United States. We shall hereafter revert to that phase of the controversy when we come at some length to construe the contracts.

In any event, there were never any finally approved shop drawings showing the deviations in construction made necessary because of the switch from conventional to prefabrication, nor were the pilot buildings completed in time to serve as a guide. As a consequence, and also as the result of some delay by Farnsworth in the forming and laying of the concrete slabs and foundations on which the buildings were to be assembled and erected, Tri-State performed an unusually large amount of work not contemplated at the time of its contract with Farnsworth. Ultimately, Tri-State claimed to be entitled to extra compensation in the amount of $151,341.78.

The contract between Farnsworth and Tri-State provided that, "No alterations or changes shall be made except upon contractor's (that is, Farnsworth's) written order." However, over Farnsworth's objection, Mr. Con-

verse, Tri-State's superintendent in charge of the job, testified that, about the second week in June, Mr. McMaster, Farnsworth's construction engineer, agreed with him that Tri-State was "doing a whole lot of work that wasn't contemplated," and

> ". . . in order to expedite the job with the schedule they were trying to drive at for the completion date it would be impossible to get a change order for every item that we felt was beyond our scope of work, which was a great number of them that we were called upon to do. So, in order to expedite the job, it was his suggestion that we would go ahead and complete these items of work and that we would bill American Houses for items that wasn't any question about American Houses accepting, but that we had only a contract with Farnsworth. We had no contract with American Houses. And that we would look to them for a settlement between Farnsworth and American Houses as to how Tri-State would get paid. In other words, we would get paid, either by American Houses or by Farnsworth."

McMaster denied having had any such conversation. Converse testified that he confirmed his claimed verbal understanding by letter dated June 14, 1957, addressed to Farnsworth, attention of McMaster, and reading:

> "Gentlemen:
>
> "In line with our recent conversation in regards to the additional work we are being required to do on above subject job. This is to advise that it is our opinion that your suggestion of completing the various items and then

submitting our invoice for payment is the proper procedure.

"We realize that with the job demands it would be impracticable to clear all the items as they occur, however there will be numerous items for which we can bill American Houses direct, other items will have to be settled between yourselves and American Houses. As we have only a contract with you, it is imperative that you clear the items as early as possible.

"Yours very truly,
W. K. Converse
Executive Vice President."

Converse testified that he delivered that letter in person by handing it to Mr. McMaster's secretary in McMaster's office. McMaster denied ever having seen the claimed letter. His secretary testified that she had no recollection of the letter having been handed to her, and that she had searched the office files for it but had been unable to find it. Mr. Thornhill, Farnsworth's job superintendent, and Mr. Horlock, Farnsworth's office engineer on the project, testified that the letter had not been called to their attention. There was evidence, also, that Tri-State presented no bill to Farnsworth covering the alleged extras until September 26, immediately after Farnsworth had first placed Tri-State in default for failure to supply sufficient workmen. Converse explained:

"Q You did not mail copies of those work sheets to Farnsworth during May, June, July and August, isn't that correct?

"A. That's correct. We mailed them to American Houses in line with what they had requested, that we mail what we could to American Houses, and if they didn't pay it, they would see that we were paid."

Some of Converse's testimony was corroborated by Mr. Winskie, the Government's building inspector on the project:

"On several occasions we found some of the slabs were too large and had to be spliced, and so I got he and Mr. Converse together, Mr. Jack Thornhill, who was the Superintendent, I got them together, and they would agree for Mr. Converse to go ahead and fix it, and I heard Mr. Jack say on several occasions that whatever was right about it, or whatever it took to pay for it, to just go ahead and do it."

Following the first notice of default, a meeting was held in Atlanta, attended by representatives of American, by Mr. Converse, Mr. Oastler (Tri-State's president), Mr. McMaster, and Mr. Kaskell (Farnsworth's attorney). At that meeting, Tri-State presented its pay requisition No. 6 "covering items of work done under our Contract No. CFHFS-C4 and additional items of work required by you" and showing "Due this requisition—$116,560.61." There was no itemization of the "additional items of work." Farnsworth, however, at that time did not request any itemization, but refused to pay anything not called for by its written contract. Farnsworth was advised in that meeting that Tri-State was financially unable to continue with the work, "that

it was impossible for us to continue unless a part or all of it was paid." The notice of default was withdrawn, and American agreed to advance Tri-State an additional $17,500.00, making the total, either paid or advanced by American to Tri-State, $38,879.86. Farnsworth's representatives said that "they would not pay a penny of it." About a week after that meeting, namely on October 4, Tri-State reached the end of its resources and ceased operations at Fort Stewart. Farnsworth completed the work to the satisfaction of the United States.

Tri-State commenced this litigation several months before Farnsworth had completed the project. Counter-claims and cross-claims ensued, followed ultimately by the trial and jury verdict and the judgments against Farnsworth.

We consider Farnsworth's "Specification of Errors" in their order.

"1. The district court erred in charging that the jury should construe and determine the legal effect of the contract documents."

The court undertook to inform counsel of its proposed instructions to the jury prior to their arguments,[7] and then advised counsel that it would charge the jury:

> "The Court will not attempt to exhaustively review or detail the terms and conditions of the

[7] Compare Rule 51, Federal Rules of Civil Procedure.

aforementioned contracts. These documents are attached to the pleadings which will be given you at an appropriate time and you gentlemen are invited and instructed to refer to these documents to determine their content."

The court's subsequent charge to the jury embodied that language and contained also the following:

"Gentlemen, the pleadings will be out with you, as I said just now, not as evidence, but for you to read over and get the exact contentions of the respective parties, if you so desire. Now, of course, the Court has not attempted to outline the contents of these contracts to you, but you are instructed to refer to them directly in order to determine for yourselves their contents and the duties and obligations imposed upon the respective parties."

It would have been better if the court had omitted the concluding phrase, "and the duties and obligations imposed upon the respective parties." The construction of the written contracts was, of course, for the court,[8] though factual issues were presented as to the meaning and purpose of certain technical words and ambiguous terms, such as "pilot house" and "shop drawings."[9] The courts meaning and intent were, however, reasonably clear, that is, to submit to the jury the pleadings and the contracts in order for the jury to

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[8] O'Brien v. Elder, 5th Cir., 1957, 250 F.2d 275, 278.

[9] See, Hawkins v. Frick-Reid Supply Corporation, 5th Cir., 1946, 154 F.2d 88, 89; O'Brien v. Elder, supra; J. T. Majors & Son, Inc. v. Lippert Bros., Inc., 10th Cir., 1958, 263 F.2d 650, 653, 654; 17 C.J.S., Contracts, §616, p. 1284.

see, their contents. The error in the use of the concluding phrase is not, in our opinion, sufficient ground for setting aside the jury's verdict and the judgments entered thereon.[10]

"2. The district court erred in giving erroneous charges on the contract documents. (a) The court erroneously construed the integrated agreements as being unrelated. (b) The court erroneously made Farnsworth liable to Tri-State for American's defaults."

The district court stated several times that Farnsworth had one contract with American and another contract with Tri-State. It also gave to the jury Tri-State's requested charge No. 6, as follows:

> "Gentlemen of the jury, in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials as provided for in the contract between American Houses and Farnsworth, I charge you that Tri-State would be entitled to recover any such expense from the defendant Farnsworth, and in that event Farnsworth in turn would be entitled to recover an equal amount from American Houses."

The district court further instructed the jury:

> ". . . in the event you should find that Farnsworth or American Houses has failed to perform work or to furnish materials which

[10] Rule 61, Federal Rules of Civil Procedure.

they were obligated to furnish or perform in accordance with said contracts, or said purchase order, or that they have defaulted in the proper performance or coordination of work which they were obligated to do or to coordinate, and you further find that such failure or default on their part caused or materially contributed to the failure or inability of Tri-State Construction Company to complete the performance of its subcontract in accordance with its terms, then and in such event neither Farnsworth nor American Houses would be entitled to recover from the American Surety Company, as surety, or Tri-State Construction Company, as the principal, on said performance bond.

"You are also futher instructed that, in the event you find that Farnsworth or American Houses was indebted to Tri-State Construction Company for work done on said job and wrongfully refused to pay Tri-State for such work and thereby caused or contributed to the inability of Tri-State to complete performance of said contract, as contended by American Surety Company and Tri-State, then and in that event neither Farnsworth nor American Houses would be entitled to recover from American Surety Company, as Surety, or from Tri-State Construction Company, as principal, on said performance bond."

The contract between Farnsworth and Tri-State and Farnsworth's "Purchase Order" on American were each dated March 18, 1957, though the terms of the "Purchase Order", were not finally agreed on until April

22, 1957. Tri-State agreed to erect the prefabricated materials furnished by American. Pertinent provisions of the contract between Farnsworth (referred to as "Contractor") and Tri-State (referred to as "subcontractor") are set forth in the margin.[11] The attached "Pur-

[11] "1. Subcontractor shall furnish and pay for all labor, services, and materials and perform all of the work necessary or incidentally required for the completion of that part of the work covered by the Contract Documents, as follows: "All on-site handling and erection of all materials furnished by AMERICAN HOUSES INC. including, but not limited to, receiving, checking, unloading, storing (if necessary) protecting, erecting, cleaning and bringing the work to the point of final acceptance by the government.

"It is fully understood that the materials furnished to the subcontractor by the Contractor and American Houses Inc. under this subcontract are from delivery to the job site in the control, care and custody of the subcontractor and he shall be responsible for their protection and proper use and handling.

". . . . The shipments of materials are scheduled by the Contractor and American Houses Inc. so that the first pilot buildings will be erected and closed in during the week of April 22, 1957 and the last unit will be erected and closed in by July 19, 1957. Items which must follow the plaster work and punch list items will be coordinated with the work of other trades in accordance with a schedule to be furnished by the General Contractor. The subcontractor agrees to work in accordance with and to maintai these schedules, provided subcontractor shall neither be esponsible for nor required to apply for time extensions on account of delay incurred by failure of American Houses Inc. or the Contractor to make prompt delivery of the items required to be delivered by them to the site.

"17. . . . . .

"(b) Subcontractor agrees to guarantee its work against all defects of materials or workmanship, as called for in the Contract Documents; or if no guarantee is called for by the Contract Documents, then for a period of one (1) year from the date of comple. n of said work and the acceptance of the contract by the Owner, insofar as said materials and workmanship have been furnished by subcontractor. [The last clause, "insofar as said materials and workmanship have been furnished by subcontractor" was a typed addition to the preceding printed paragraph.]

chase Order" by Farnsworth, referred to as "Purchaser," on American, referred to as "Vendor," provides in pertinent part:

> ". . . : It is understood and agreed that purchaser has entered into a subcontract with Tri-State Construction Co., 114 Ellis Street, N.E., Atlanta, Ga., for the on-job handling and erection of these materials and certain other items of work; (copy of which contract is attached hereto) and vendor agrees to provide purchaser with vendor's letter agreement that this Purchase Order and said subcontract with Tri-State Construction Co. are complementary and integrated and will produce a finished product of the included items of work complete and in place in accordance with the Prime Contract Documents. Vendor further agrees that in the event of default of said subcontractor, Vendor will provide and arrange for another subcontractor to complete the work, at no additional cost to the purchaser, such substitution to be subject to approval of subcontractor's surety. . . . ."

"This subcontract is awarded in conjunction with and contingent upon a purchase order to American Houses, Inc., Allentown, Pa., a copy of which is attached hereto and made a part of this subcontract. It is understood and agreed that the subcontractor is thoroughly familiar with the degree and methods of pre-fabrication which will be accomplished by American Houses Inc. and that the subcontractor will coordinate his operations with the finally approved shop drawings and materials supplied by American Houses Inc."

On April 4, 1957, American delivered to Farnsworth an "Integration Letter," reading as follows:

> "In consideration of the award to us of your purchase order for our furnishing certain material for construction of 388 units of Capehart Family Housing at Fort Stewart, Georgia, which is to be erected under a contract between yourselves and Tri-State Construction Co., Inc., a copy of which is attached to your purchase order, it is mutually understood and agreed that the contract with Tri-State Construction Co., Inc., and the purchase order to us are complementary and intend to integrate in such a way as to produce a finished product of all the items shown on plans and specifications attached to the said contract with Tri-State Construction Co., Inc. and the said purchase order to us, and if any deficiency in materials necessary to complete the work in accordance with said plans and specifications shall arise, we will see to it that such deficiency will be supplied.
>
> "If default shall occur in the performance of the contract between yourselves and Tri-State Construction Co., Inc., we shall obtain another contractor in place of Tri-State Construction Co., Inc. at no additional cost to you as approved by the bonding company issuing its bond on the contract between yourselves and Tri-State Construction Co., Inc."

Tri-State and American furnished to Farnsworth separate performance bonds with different corporate sureties. About a month after work on the job be-

gan,[12] American was added as a co-obligee with Farnsworth on Tri-State's performance bond.

We find no provision whereby Tri-State agreed to assume responsibility for performance by American of American's "Purchase Order." Tri-State limited the scope of its guarantee of materials and workmanship by the typed interlineation, "insofar as said materials and workmanship have been furnished by subcontractor." (See footnote 11, *supra.*) Tri-State's contract with Farnsworth protected Tri-State from responsibility for American's failure to make delivery according to its "Purchase Order." We conclude that Tri-State's obligations under its contract were limited to its work. The reference in Tri-State's contract with Farnsworth to American's purchase order was simply to describe more clearly the work that was to be performed by Tri-State. Tri-State did not guarantee, nor become responsible for, American's performance. In a similar situation, the Supreme Court has well said:

> "The reference in the sub-contract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the sub-contractor. Notwithstanding occasional expressions of a different view . . . , in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of sub-contracts, as in other cases of express agreements in writing,

[12] At the insistence of Farnsworth, but apparently in order to protect American because of its obligation to provide a substitute for Tri-State if Tri-State defaulted.

> a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified."[13]

American, by the terms of its "Purchase Order" and by its subsequent "Integration Letter," agreed that its "Purchase Order" and Tri-State's subcontract "are complementary and integrated and will produce a finished product etc." American further agreed "in the event of default" of Tri-State to provide another subcontractor. Before American's responsibility for Tri-State's performance should become operative, Tri-State must have broken its contract with Farnsworth. If default on the part of Farnsworth, making it impossible for Tri-State to continue, was available as a defense to Tri-State, it was available to American also.

We conclude that the construction of the written agreements by the district court was not erroneous.

Moreover, it was for the jury to determine whether or not Tri-State's original contract was modified, as testified by Mr. Converse, so as to provide that additional work might be performed by Tri-State and invoice for payment submitted later, and that Farnsworth would be responsible to Tri-State for payment, if not made by American, then by Farnsworth itself.[14]

[13] Guerini Stone Co. v. Carlin, 1916, 240 U.S. 264, 277. To like effect, see Sugarland Industries v. Old Colony Trust Co., 5th Cir., 1925, 6 F.2d 203, 208; Hill & Combs v. First National Bank of San Angelo, Texas, 5th Cir., 1944, 139 F.2d 740, 742; Edward E. Morgan Co. v. United States, 5th Cir., 1956, 230 F.2d 896, 903.

[14] Farnsworth does not seek review of the action of the district court in overruling its objections to the admissibility of such evidence. We think that it was admissible under

We find no reversible error in the court's instructions to the jury complained of in specifications of error number 2.[15]

"3. The district court erred in charging the jury (a) that it could find a default on the part of Farnsworth when the uncontradicted evidence showed that Farnsworth was not in default under the contract, and (b) that Tri-State had the right to abandon its contract work if the jury found that Farnsworth had refused to pay for alleged non-contract work."

When Tri-State left the job, Farnsworth had made all payments provided for by its original written contract, but had refused to pay for any extras. At the trial, upon cross-examination of Mr. McMaster, Farnsworth conceded that it had agreed to pay for extra items of work in the amount of $11,891.21, for which payment had not been made. As has already been said, it was for the jury to determine whether the contract between Farnsworth and Tri-State had been modified so as to make Farnsworth responsible for payment to Tri-State for all of the extras. The charge specifically complained of in Specification of Error 3 has already been quoted (ante p. 10), and we find no reversible error in the giving of that instruction.

Georgia Code Annotated, Title 38, Sec. 507, and American National Ins. Co. v. Lynch, Ga.App. 1934, 176 S.E. 546, with which Heard v. Dooly County, Ga., 1897, 28 S.E. 986, does not appear to conflict.

[15] It will be noted that two of those instructions (ante p. 10) were particularly directed to Farnsworth's and American's counterclaims which sought recovery against Tri-State and its surety on Tri-State's performance bond.

"4. The district court erred in charging that the jury could allow Tri-State to recover for alleged extras without first finding (a) that there was a distinct agreement therefor, and (b) that such alleged extra work was not covered by the original contract."

The charge complained of reads as follows:

> "Ordinarily when one renders services to another, which the latter accepts, a promise is implied to pay the reasonable value thereof.
>
> "In this connection, Gentlemen, I charge you that if you find that Tri-State Construction Company has performed services in the form of labor and materials in behalf of and at the instance of the defendant Farnsworth and that these services were received and accepted and were of a benefit to the defendant Farnsworth, and that Tri-State was not in any wise in default, then and in that event, you gentlemen shall determine the reasonable value of the labor and materials furnished, and return a verdict in favor of Tri-State and against the Defendant Farnsworth in an amount properly determined by you."

Under Georgia law, Tri-State, if not itself in default, would be entitled to recover in *quantum meruit* for all services performed at the request of and for the benefit of Farnsworth whether required by the original contract or by the claimed subsequent modification.[16]

[16] Georgia Code Annotated, Title 3, Sec. 107; Collins v. Frazer, Ga.App. 1919, 98 S.E. 188; Weathercraft Co. v. Byrd, Ga.App. 1924, 123 S.E. 180.

"5. The district court erred in giving charges requested by appellees which were in conflict with charges given at the request of Farnsworth, and which, in effect, resulted in denying Farnsworth's requests to charge."

The district court simply gave all of the charges requested by the parties and that resulted in some conflict, a practice certainly not to be approved. However, the charges requested by the appellees correctly stated the law of the case, and Farnsworth cannot complain of conflicts brought about by its own erroneous requests.[17]

We have carefully considered the remaining specifications of error,[18] but find no reversible error in any of the matters complained of. The judgments are therefore

AFFIRMED

CAMERON, Circuit Judge: I dissent.

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17. United States v. Wurtsbaugh, 5th Cir., 1944, 140 F.2d 534, 537; Illinois Central R. Co. v. Griffin, 7th Cir., 1897, 80 Fed. 278, 282.

18. "The district court erred:

"6. —In making interjected comments while delivering charges requested by Farnsworth, which destroyed the effectiveness of those charges and emphasized the contentions of appellees.

"7. —In permitting counsel for Tri-State to argue in the presence of the jury the correctness or incorrectness of charges which the court had said it would give, and to read excerpts from law books to the jury.

"8. —In committing trial errors so numerous and prejudicial as to deprive appellant of a fair trial.

"9. —In denying Farnsworth's motions for directed verdicts and for judgments n.o.v.

"10. —In denying a new trial."

JUDGMENT OF THE COURT OF APPEALS

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, R. P. Farnsworth & Co., Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Cameron, Circuit Judge, Dissenting.

Request No. 2 by Farnsworth

(R 1359)

"I further charge you that the agreements between Farnsworth, Tri-State and American Houses, Inc. were integrated and complementary and that Tri-State and American Houses, Inc. agreed to provide Farnsworth with a finished product complete and in place in accordance with the contract of Farnsworth with the Government. If you find from the evidence that American Houses and Tri-State failed to deliver the materials and to erect such materials as a finished product as required by the Government contract, then and in that event they together would be liable to Farnsworth for such damages incurred by Farnsworth from their failure to furnish the finished product on the job at Fort Stewart. You will look to the evidence to determine what damages, if any, were sustained by Farnsworth."

Request No. 10 by Farnsworth

(R 1365)

"If you find from the evidence that American Houses or Tri-State suffered damages by reason of American Houses' failure to prepare shop drawings or to furnish samples of the prefabricated units, you may not award damages to either American Houses or Tri-State against Farnsworth for any such damages they might have sustained because of such failure."

Request No. 11 by Farnsworth

(R 1365)

"I further charge you that under the contract between the parties, it was the sole obligation of American Houses to deliver certain materials to the job site at Fort Stewart, in accordance with a schedule agreed to by the parties. It was not the responsibility of Farnsworth to see that such schedule, or any other schedule agreed to by the parties, was maintained. You may not, therefore allow Tri-State any damages which it may have sustained as a result of the manner in which, or time at which, American Houses made deliveries of such materials."

Request No. 17 by Farnsworth

(R 1368)

"Under the agreement between American Houses and Farnsworth it is provided that if there was any deficiency in material necessary to complete the work described in the contract between Farnsworth and Tri-State and the purchase order between American Houses and Farnsworth, in accordance with the plans and specifications of the Government, American Houses would see to it that such deficiency would be supplied. If you find that after Farnsworth took over the completion of the work to be performed by Tri-State, such deficiency in materials existed, and that American Houses failed to supply those deficiencies after demand by Farnsworth therefor, and if you further find that

Farnsworth has had to spend money in order to purchase materials or to do work to supply such deficiencies, then Farnsworth is entitled to recover from American Houses the reasonable cost to Farnsworth of supplying such deficiencies."

Prejudicial Interjections in Petitioner's Charges

1—In Petitioner's Request No. 1 (R 1359):

"Now, that may seem repetitious to what I charged you just now, but you will see the difference, if you heard my other charge. Of course, along this line, Tri-State says that the original written contract was changed—or a subsequent agreement was made about which you gentlemen heard the evidence, and therefore the original contract was not in effect as to certain claims of Tri-State. I am sure you gentlemen understood that" (R 1306).

2—In Petitioner's Request No. 2 (R 1359):

". . . and that the failure to do so was not caused by an act of Farnsworth" (R 1306).

3—In Petitioner's Request No. 3 (R 1359-60) after "Such a stipulation in the contract may be waived by the parties", the words "and which is contended by Tri-State" (R 1307).

4—In Petitioner's Request No. 6 (R 1362-63):

"I think I charged you in different words as to that, as to the parol agreement and the written agreement. I think I charged you specifically as to that" (R 1310).

5—In Petitioner's Request No. 9 (R 1364):

"Tri-State, of course, contends that it was not given an extension by Farnsworth but was forced to leave the

job by Farnsworth. Now, that is all a question for you gentlemen to decide" (R 1311).

6—In Petitioner's Request No. 13 (R 1366):

"Of course, that is one of the questions in this case. Farnsworth said that Tri-State abandoned the job, and Tri-State says that it was forced to leave the job" (R 1313). This was added to the requested charge although in two places in the same charge the court had inserted "and is not forced to do so by acts of Farnsworth," . . . "and was not forced to do so by Farnsworth" (R 1313).

7—In Petitioner's Request No. 14 (R 1366-67):

"And that same question comes up again as to why Tri-State left the job" (R 1313-14).

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 728.

R. P. FARNSWORTH & CO., INC.,
Petitioner,

versus

TRI-STATE CONSTRUCTION COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR AMERICAN HOUSES, INC., IN OPPOSITION.

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IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR AMERICAN HOUSES, INC., IN OPPOSITION.

Opinion Below and Jurisdiction.

On November 20, 1957, Tri-State Construction Company (hereinafter called Tri-State), a Georgia corporation with its principal office in Atlanta, Georgia, instituted an action in the United States District Court for the Southern District of Georgia, Savannah Division, against R. P. Farnsworth and Company, Inc. (hereinafter called Farnsworth), a Delaware corporation with its principal office in New Orleans, Louisiana, to recover amounts allegedly due for work performed in the construction of housing at Fort Stewart, Georgia. Farnsworth in turn filed a counterclaim

against Tri-State and a third party complaint against Tri-State's surety, American Surety Company of New York, and also filed a third party complaint against American Houses, Inc. (hereinafter called American), a Delaware corporation with its principal office in Allentown, Pennsylvania and its surety, Federal Insurance Company. American in turn filed a counterclaim against Farnsworth to recover for the value of materials delivered.

Tri-State's claim against Farnsworth was for $146,518.28 due it for work performed for Farnsworth at its request. Farnsworth has never questioned the fact that Tri-State did in fact do this extra work, but simply contended that it was not responsible to Tri-State for it. Farnsworth counterclaimed against Tri-State and brought a third party complaint against American, claiming amounts due from them for delays and extra cost of doing the work. American counterclaimed against Farnsworth to recover the value of materials delivered by American to the job. Farnsworth admittedly owed American the amount of $164,949.80 for materials.

The case was tried before a jury and after a 10-day trial (R. 88) the jury returned a verdict in favor of Tri-State against Farnsworth in the amount of $133,020.80 and in favor of American against Farnsworth in the amount of $151,142.35.

From this verdict (R. 1395) and the judgments of the District Court (R. 1396, 1397) Farnsworth appealed to the United States Court of Appeals for the Fifth Circuit and on October 27, 1959, that court affirmed the judgments of the District Court. The opinion is reported at 271 F. 2d 728-738. On December 1, 1959, the Court of Appeals denied a motion for rehearing and following this denial petitioner then filed its petition for certiorari.

Question Presented.

Ground "a" urged by Farnsworth at page 2 of its brief was carefully considered by the Court of Appeals and as it stated: "The charges requested by the appellees clearly stated the law of the case, and Farnsworth cannot complain of conflicts brought about by its own erroneous request" (271 F. 2d 728 at 737, headnote 9). Ground "b" of Farnsworth was carefully considered by the Court of Appeals wherein the court held: "The court's meaning and intent were, however, reasonable clear, that is, to submit to the jury the pleadings and the contracts in order for the jury to see their contents" (271 F. 2d 728 at 733, headnotes 1, 2).

Grounds "c" and "d" urged by Farnsworth fall within the discretion of the trial court in permitting argument to the jury and in making additions to a party's request to charge. These, too, were carefully considered by the Court of Appeals and no error found (271 F. 2d 728 at 738).

No basis exists in fact or in law for Farnsworth's contentions. It is clear that there has been no departure from the usual course of proceedings in the federal courts. Farnsworth is asking this court for a review of facts in an isolated situation which have been passed upon by a jury, a trial court, and a Court of Appeals—all adversely to it. Its petition should be denied.

From the following statement of the case it will be evident that the verdict of the jury was not unjust. Certainly it was amply supported by the evidence. It will be remembered that Tri-State's claim against Farnsworth was for $146,518.28 and that Farnsworth did not contest the fact that Tri-State had done this work; it simply refused to pay Tri-State for it. The jury found for Tri-State against Farnsworth in the amount of $133,020.80. As between

Farnsworth and American, Farnsworth admittedly owed American the amount of $164,949.80 for materials. The jury returned a verdict in favor of American against Farnsworth in the amount of $151,142.35.

We submit that it is abundantly clear that Farnsworth's contentions are groundless. Moreover, it is noteworthy that Farnsworth has nowhere shown how or in what way it was prejudiced by any of the alleged errors it urges upon this court. The long and short of Farnsworth's position is that of objections purely on technical grounds, with no showing whatsoever of any prejudice to it. The questions presented by Farnsworth evolve around and involve factual determinations which have already been considered by the Court of Appeals adversely to Farnsworth.

There is no showing by Farnsworth of any constitutional issue in this case; nor is there any suggestion whatsoever of any conflict of circuits and certainly this case is not concerned with the administration of or interpretation of a Federal Act. It is not a case of any peculiar gravity or general importance to the public. It is simply a request for review of specific facts in an isolated situation. It is exceedingly doubtful if the same issues would ever recur again in another case.

Moreover, the case is concerned only with the application of familiar principles of law to a particular set of facts. The case turns on the evaluation of testimony and on the Court of Appeals' previous factual determination that the charges given by the trial court were correct statements of principles of law applicable to the factual issues presented. As such this court should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on application of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Company*, 274 U. S. 543,

544, 71 L. Ed. 1193, 1194, 47 S. Ct. 663; *N. L. R. B.* v. *Pittsburgh Steamship Company*, 340 U. S. 498, 503, 95 L. Ed. 479, 483, 71 S. Ct. 453.

The petitioner, in urging that the writ issue, has cited as authority and relied upon several cases arising under the Federal Employees Liability Act. It is submitted that this court granted certiorari in many cases of that class in order to correct a condition which it felt it should remedy; i. e., the misapplication of the Act and the deprivation of the injured employees' right to have the jury alone weigh disputed evidence. See concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69-70, 93 L. Ed. 497, 507-509, 69 S. Ct. 413. Whereas, here Farnsworth had the benefit of an extended jury trial, consuming 10 days, and which is included in a record of 1474 pages and numerous exhibits.

This court is being called upon to review a case which was before a jury for ten days, before the trial court, and before the Court of Appeals. There has been no showing of any obvious or exceptional error and as this court has many times held: "A court of law, such as this court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by the two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Manufacturing Company* v. *Linde Air Products Company*, 336 U. S. 271, 275 (2), 93 L. Ed. 672, 677, 69 S. Ct. 535.

Moreover, the writ of certiorari should be exercised sparingly and only in cases of gravity and importance. As was stated in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422: . . . "It is very important that we be consistent in not granting the writ of certiorari except in cases involving

principles, the statement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. The present case certainly comes under neither heading."

Statement of the Case.

On February 27, 1957, Farnsworth entered into a contract with the United States of America whereby, as general contractor, Farnsworth agreed to erect 74 multiple unit dwellings at Fort Stewart, Georgia, pursuant to the Capehart Family Housing Act. These 74 dwellings were of two types. The first, known as the "F" type dwelling, was a two-story eight-unit apartment, of which 40 buildings, consisting of 320 apartment units, would be built. The second type, known as the "C" type building, consisted of a two-unit one-story duplex, of which 34 buildings or 68 units would be built. The agreement provided that Farnsworth would be paid $6,230,100, which was subsequently paid to it (R. 1021).

The basic contract called for conventional construction, that is, construction on the site from raw materials with no prefabricated parts. Subsequently, it was determined to switch from conventional construction to prefabrication of the carpentry materials to be used in the project. Prefabrication would enable Farnsworth to eliminate a great deal of supervision and a great many workmen on the job (R. 589-590). American would provide the carpentry materials, prefabricated at its plant, for a total contract price of $860,178, which contract was executed by American on April 22, 1957. Prior to that time, on March 18, 1957, Farnsworth had entered into an agreement with Tri-State,

who had had previous experience with American's materials, wherein Tri-State was to erect the carpentry materials on the job at a contract price of $191,466.30. Approximately 20% of the total amount of work on the job would be done by Tri-State and American and the remaining 80% of the work would be performed by Farnsworth and by other subcontractors under its control and supervision (R. 697).

The Corps of Engineers, representing the United States, agreed to the switch from conventional construction to prefabrication of the carpentry materials on condition that shop drawings be submitted showing how this would be done, and on the further condition that one "pilot" building of each of the "F" and "C" type units be erected prior to the construction of the remaining dwellings (R. 149).

The purpose of the pilot building was to allow the mechanical trades and other subcontractors to go into the dwellings, examine them, and to work on each type, so that the "wrinkles" or "bugs" would be worked out and all parties could find out what changes had to be made to the "F" and "C" type buildings, before any additional buildings would be shipped in (R. 256-258, 300, 322, 411, 679, 817, 891, 1119).

The purpose of the shop drawings of the carpentry units to be shipped by American and the shop drawings of the various subcontractors under Farnsworth's supervision, was to indicate how the work of all of the trades and of the subcontractors would be correlated with the prefabricated carpentry materials (R. 303-304, 325, 1111-1112).

The pilot house never served its function because Farnsworth failed to require the erection and correlation of the various mechanical trades in the pilot houses (R. 103, 259, 260, 300, 301, 374). It was Farnsworth's responsibility,

as the prime contractor, to receive the shop drawings from American and from the other trades and other subcontractors and not only submit all of the shop drawings to the Corps of Engineers but to follow through with the Corps of Engineers and secure the latter's final approval of the shop drawings (R. 608, 685-686, 932-933).

The contract between Tri-State and Farnsworth provided in part, "The shipments of materials are scheduled by the contractor and American Houses, Inc., so that the first pilot buildings will be erected and closed in during the week of April 22, 1957". It is undisputed that at the time Tri-State began the work during the week of April 22, the pilot houses had not been completed as planned and no finally approved shop drawings had been furnished (R. 302).

The failure of Farnsworth to erect and close in the first pilot buildings during the week of April 22, 1957, was the first failure and default on the part of Farnsworth. Farnsworth's failure to procure finally approved shop drawings was its second breach and default.

The first stage in the construction of the buildings was the forming and laying of concrete slabs and foundations by Farnsworth. It was delayed at the outset of the work.

The Purchase Order agreement between American and Farnsworth established a delivery schedule for the carpentry materials prefabricated by American. During the planned erection of the pilot houses, additional buildings were not supposed to be shipped until the bugs had been eliminated from the pilot houses (R. 299, 301) and before final shop drawings indicating thereon the changes in construction were approved (R. 302). American did not want to deliver any materials to the job until Farnsworth had received from the Corps of Engineers the finally approved shop drawings (R. 689). However, Farnsworth insisted

that American continue with the shipment of materials and that American adhere to the delivery schedule (R. 206, 207, 366, 1131).

So it was, then, that when the preparation of the slabs and foundations by Farnsworth was delayed, and the pilot houses had not been completed, American offered to hold up future shipments (R. 101, 365) and wired Farnsworth, offering to suspend delivery of materials (R. 690-691). However, Farnsworth insisted on delivery of the units (R. 206-207, 366) which piled up on the job (R. 752).

The failure of Farnsworth to construct the pilot house and to have finally approved shop drawings, its delay in laying the slabs and foundations, and its insistence on the delivery of materials to the job, created a chaotic condition (R. 102-104, 301, 311). Farnsworth pushed ahead with construction and insisted that Tri-State continue on with the erection of the carpentry materials, despite the fact that there were no shop drawings and there had been no correlation between the carpentry materials and the work of the other trades, such as the plumbing and heating contractors. As a result, Tri-State was required to do a great deal of extra work which was not contemplated for in its contract (R. 94-96). Mr. McMaster, Field Representative of Farnsworth, and W. K. Converse, Field Representative of Tri-State, agreed that Tri-State would perform all of this extra work and that Farnsworth would see that Tri-State was paid therefor (R. 126, 432). This agreement was later confirmed by letter from Tri-State to Farnsworth (R. 129). The Government building inspector on the project testified that on several occasions he had heard Farnsworth's superintendent authorize Tri-State to do extra work (R. 415-416).

In reliance upon Farnsworth's assurance that Tri-State would be paid, Tri-State proceeded on with this extra work.

Finally, in September 1957, Tri-State reached the point where it had to have money in payment of the extra work in order to continue on with the job. At a meeting in the latter part of September, American advanced Tri-State the sum of $17,500.00, with no admission of any responsibility by American but simply as an advance to allow Tri-State to continue (R. 1184, 1185). This made a total of $38,879.86 advanced by American to Tri-State for this purpose. At this meeting Tri-State submitted to Farnsworth its claim for the extra work it had done to that date. The total amount was $112,460.92. Farnsworth did not then nor during the trial did it ever deny that Tri-State had in fact done that much work. It simply refused to pay anything to Tri-State and admittedly did not ask that any of Tri-State's claims for extra work be explained, identified or described (R. 653, 654). On October 3, Tri-State made further demand on Farnsworth for some payment which Farnsworth refused and on October 4, Tri-State left the job.

Following Tri-State's departure from the job, Farnsworth continued on and completed the work. In this regard American, on April 4, 1957, had delivered to Farnsworth a letter agreeing to procure another contractor in the event that Tri-State defaulted on the job. One of the issues presented to the jury was whether Tri-State was in default for leaving the job on October 4. The jury resolved this issue in favor of Tri-State. Since American was not responsible for Tri-State's performance or responsible for procuring another contractor unless Tri-State had broken its contract, then when it was found that Tri-State was not in default, American's responsibility never became operative. As the Court of Appeals stated in its opinion, page 736, headnote 4, "If default on the part of Farnsworth, making it impossible for Tri-State to continue, was avail-

able as a defense to Tri-State, it was available to American also."

Thereafter, Tri-State instituted suit against Farnsworth to recover the amount of $146,518.28 due it for work done which Farnsworth had refused to pay. The basic factual questions submitted to the jury with respect to Tri-State's claim against Farnsworth were: (1) Did Tri-State perform extra work outside the scope of its subcontract? (2) Did Tri-State and Farnsworth depart from the written subcontract in entering into a separate agreement, expressed or implied, to pay Tri-State for any such extra work? (3) If there was such an agreement, did Farnsworth default in its obligations to Tri-State in connection therewith? (4) Was Tri-State justified in departing the job as a result of any default of Farnsworth?

The jury resolved these issues in favor of Tri-State and against Farnsworth and returned a verdict in favor of Tri-State in the amount of $133,020.80 (R. 1395).

Tri-State did not, as Farnsworth says at the bottom of page 6 and the top of page 7 and again at bottom of page 10 of its petition, base its claim in part because of American's failure to deliver materials. This statement of Farnsworth is completely erroneous. As is noted, hereinafter, Farnsworth's argument (A-1-b at pages 11-12 of its petition) is based on this misstatement of fact. Tri-State's cause of action against Farnsworth was based solely on Farnsworth's refusal to pay Tri-State for work done for Farnsworth at its request.

Farnsworth counterclaimed against Tri-State and in turn filed a third party complaint against American, alleging that it was damaged because American had failed to furnish proper materials and because American had not procured a contractor to complete the work. American in turn counterclaimed against Farnsworth to recover the

value of materials delivered to Farnsworth. In this connection, Farnsworth admitted that it owed American $164,949.80 for materials delivered (R. 982, 1008). These issues were submitted to the jury and the jury found against Farnsworth on its claims and found in favor of American on its claim and returned a verdict in favor of American against Farnsworth in the amount of $151,142.35 (R. 1395).

ARGUMENT.

A.

1. Alleged Erroneous and Conflicting Charges.

a.

Certain of the charges given by the trial court are complained of by Farnsworth. These charges were carefully considered by the Court of Appeals and were found to correctly state the law of the case. As is hereinafter shown, and as the Court of Appeals has found, "Farnsworth cannot complain of any conflicts brought about by its own erroneous requests" to charge (271 F. 2d at page 737, headnote 9).

The Court of Appeals carefully considered the charges complained of by Farnsworth in Subsection "b" of its argument (see headnotes 2, 3 and 4 of the opinion at pages 733-736), and considered the charge complained of by Farnsworth in Subsection "c" of its argument (headnotes 7 and 8 of the opinion at page 737), and found no error.

If the charge of the court is in any way conflicting and contradictory it was occasioned by Farnsworth's own erroneous requests to charge. In this regard it will be remembered that at the inception of the trial and pursuant

to the request of the court, all parties submitted requests to charge. At this time Farnsworth submitted six requests (R. 1375-1382). Subsequently at the eleventh hour, and midway of the second week of the trial, it dropped its initial requests to charge and in lieu thereof submitted its 23 requests to charge (R. 1358-1374). Prior to the argument to the jury, the trial court read to counsel its proposed charge to the jury which included all of Farnsworth's requests to charge. At this stage of the proceedings certain objections were raised to the charges and counsel for Tri-State wanted to "thrash" the matter out then as to the objections raised to the charges (R. 1253). However, Farnsworth's counsel encouraged the postponement of any consideration of the objections to the charges until after the jury was charged, at which time the parties would simply file their exceptions to the charges (R. 1252-1253).

If the charges were contradictory, as Farnsworth now so vehemently claims, then it was incumbent upon it at that time to "thrash out the issues" within the spirit of Rule 51 of Federal Rules of Civil Procedure so that if there was error in the charges the trial judge would have the opportunity to correct them. This Farnsworth did not do and it cannot now be heard to complain. "A litigant cannot, by remaining silent when he should speak, put the court into error by afterward complaining of his action." *Defonce Construction Company, Inc.* v. *City of Miami*, 256 F. 2d 425, 428 (5th Cir. 1958) and cases cited at footnote 2. It is well settled upon the grounds of estoppel that Farnsworth cannot complain of any alleged inconsistent or confusing charges which are "invited" and brought about by its own erroneous charges. *United States* v. *Wurtsbaugh*, 140 F. 2d 534, 537, (1) (5th Cir. 1944); *Illinois Central Railroad Company* v. *Griffin*, 80 Fed. 278, 282 (7) (7th Cir. 1897).

b.

In Subsection "b" of its argument Farnsworth complains of three charges and alleges, in effect, that the charges made it the guarantor of American's performance. This contention is completely without merit and is based on an assumption by Farnsworth which has no support in the record of this case. As we have hereinbefore pointed out (page 11) the sole theory of Tri-State's case was Farnsworth's refusal to pay it the sums of money due it for work done by Tri-State at Farnsworth's request. Tri-State made no claim against Farnsworth because of any failure of American to deliver materials. On the other hand, it was Farnsworth—not Tri-State—that sued American, claiming damages from it for alleged failure to deliver materials. American in turn claimed amounts due from Farnsworth (which Farnsworth admitted it owed to American) for materials furnished by American to Farnsworth.

We come then to consider the first charge complained of by Farnsworth in Subsection "b" of this portion of its argument. The quotation by it from the charge is taken out of context and to properly understand the charge, it is quoted here in full (R. 1302):

> "Gentlemen of the jury, in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials as provided for in the contract between American Houses and Farnsworth, I charge you that Tri-State would be entitled to recover any such expense from the defendant Farnsworth, and in that event Farnsworth in turn would be entitled to recover an equal amount from American Houses."

The portions of the charge which were omitted by Farnsworth and which are now properly inserted, gives the com-

plete meaning of the charge and completely rebuts the contentions of Farnsworth that this charge made it the guarantor of American. The charge simply means that in the event Tri-State should recover from Farnsworth for any failure of American to furnish materials, then Farnsworth in turn would be entitled to recover an equal amount from American. Farnsworth would be left whole.

In this same regard it is particularly interesting that Farnsworth has seen fit to complain of that charge when it requested the virtually identical charge (Request No. 16, R. 1368), which was charged by the trial court (R. 1314-1315) and which charge in reference to American's obligation to deliver materials states in its last sentence thereof:

> "If you find that American Houses failed to comply with said obligation and that as a result thereof Tri-State sustained certain damages, and if you allow Tri-State to recover from Farnsworth all or any part of said damages you must allow Farnsworth to recover the same amount over against American Houses."

Farnsworth's own request to charge is the same in scope and in purpose as that to which it has made an objection. Surely it cannot be said to have been prejudiced by a charge which it has used itself. "A party cannot complain of an alleged error in instructions when the same error is found in its own instructions." *Krienke* v. *Illinois Central Railroad Company*, 249 F. 2d 840, 846(6) (7th Cir. 1957).

We turn now to the last two charges complained of by Farnsworth in Subsection "b" of its argument at page 11. These charges were considered and approved by the Court of Appeals (pages 733-736). The two charges complained of were requests to charge of American Surety Company of New York (R. 1382-1384), who was Tri-State's surety.

It will be remembered that American Surety was surety on Tri-State's performance bond under Tri-State's contract with Farnsworth and Farnsworth was made an obligee under this bond. Subsequently, at Farnsworth's own request American was added as a co-obligee with Farnsworth on this performance bond, (R. 1201) so that they became joint obligees.

It is well settled that in the event either of said co-obligees, either Farnsworth or American, should default in the performance of the obligations imposed upon them under the prime contract, the subcontract with Tri-State, and the purchase order to American, and if such defaults of either of them should contribute to the inability and failure of Tri-State to complete performance of the contract, then the effect of any such default would be to increase the risk of the surety, as surety on the bond of Tri-State, and would discharge the surety, American Surety Company, from liability thereon. *Seaboard Loan Corporation* v. *McCall*, 61 Ga. App. 752, 754, 7 S. E. 2d 318, 319 (1940); *Scarratt, et al.* v. *Cook Brewing Company*, 117 Ga. 181 (3); 43 S. E. 413(3); *Georgia Code Annotated*, Section 103-203.

It was in this status, then, that American Surety Company requested the court to charge the jury (R. 1382-1384) that it would not be responsible on its performance bond if either of said joint obligees, Farnsworth or American, defaulted in its obligations. Whereupon the trial court charged in this respect and it is submitted that the charges are eminently proper (R. 1319-1320):

> "The Defendant Farnsworth has filed in this case a third party complaint against the American Surety Company of New York in which the Defendant Farnsworth is seeking to recover from the American Surety Company of New York, as surety on the performance bond given by the Plaintiff, Tri-State Con-

struction Company, damages alleged by Farnsworth to have been sustained by it as a result of the failure and default of Tri-State Construction Company to perform and complete its contract with Farnsworth.

"In this connection, I charge you that, while Tri-State was obligated to carry out its contract with Farnsworth in accordance with the terms thereof, this obligation was conditioned upon Farnsworth performing, in a workmanlike manner, the work it was obligated to perform under its prime contract, and American Houses furnishing, in a workmanlike manner, the materials it was obligated to furnish under its purchase order, to the extent necessary to enable Tri-State to perform the work it was obligated to do, and I instruct you that the liability of the American Surety Company, as surety on the aforesaid performance bond, was similarly conditioned.

"For that reason, in the event you should find that Farnsworth or American Houses has failed to perform work or to furnish materials which they were obligated to furnish or perform in accordance with said contracts, or said purchase order, or that they have defaulted in the proper performance or coordination of work which they were obligated to do or to coordinate, and you further find that such failure or default on their part caused or materially contributed to the failure or inability of Tri-State Construction Company to complete the performance of its subcontract in accordance with its terms, then and in such event neither Farnsworth nor American Houses would be entitled to recover from the American Surety Company, as surety, or Tri-State Construction Company, as the principal, on said performance bond.

"You are also further instructed that, in the event you find that Farnsworth or American Houses was indebted to Tri-State Construction Company

for work done on said job and wrongfully refused to pay Tri-State for such work and thereby caused or contributed to the inability of Tri-State to complete performance of said contract, as contended by American Surety Company and Tri-State, then and in that event neither Farnsworth nor American Houses would be entitled to recover from American Surety Company, as surety, or from Tri-State Construction Company, as principal, on said performance bond.

"Whether Farnsworth or American Houses has defaulted in the performance of any obligations imposed upon them under said contracts or has failed to pay Tri-State any monies lawfully due, and whether any such default or failure caused or contributed to the inability or failure of Tri-State to complete the performance of its subcontract are questions of fact for determination by you with respect to which the Court expresses no opinion."

c.

Turning now to Subsection "c" of this portion of Farnsworth's argument, it complains of Tri-State's request to charge No. 4 (R. 1392), which was charged by the court (R. 1300-1301), upon the alleged grounds that it dispensed with Tri-State's burden of proving a waiver of the requirements of the subcontract with respect to written change orders.

The absurdity of Farnsworth's contention is immediately apparent when we consider Request No. 3 of Tri-State (R. 1390, 1391) which was charged by the court (R. 1299) immediately preceding the charge complained of by Farnsworth (R. 1300-1301). The preceding charge of the trial court correctly and fully charged the jury on the question of waiver of the requirement of written change orders in the contract (R. 1299). It is noteworthy that

Farnsworth does not contend that this charge is in any way erroneous. Moreover, it admits that the court correctly charged the jury on its own request to charge on waiver (R. 1360, 1307).

The trial court followed its charge on waiver of written change orders with the charge complained of by Farnsworth which is manifestly correct and not erroneous (R. 1300-1301):

> "In this connection, Gentlemen, I charge you that if you find that Tri-State Construction Company has performed services in the form of labor and materials in behalf of and at the instance of the defendant Farnsworth and that these services were received and accepted and were of a benefit to the defendant Farnsworth, and that Tri-State was not in any wise in default, then and in that event, you gentlemen shall determine the reasonable value of the labor and materials furnished, and return a verdict in favor of Tri-State and against the Defendant Farnsworth in an amount properly determined by you."

As the Court of Appeals held: "Under Georgia law, Tri-State, if not itself in default, would be entitled to recover in *quantum meruit* for all services performed at the request of and for the benefit of Farnsworth whether required by the original contract or by the claimed subsequent modification" (271 F. 2d at 737, headnote 8).

It is evident, then, that the charges given by the trial court correctly stated the law applicable to the issues of this case.

2. Alleged Contract Interpretation by Jury.

This allegation of error by Farnsworth was carefully considered by the Court of Appeals who found no errors (271 F. 2d at 733, headnotes 1 and 2). It is quite clear that the court did not direct the jury to interpret the agreements. At the very outset of the trial court's charge (R. 1282) he charged:

> "The court will not attempt to exhaustively review or detail the terms and conditions of the aforementioned contracts. These documents are attached to the pleadings which will be given you at an appropriate time and you, gentlemen, are invited and instructed to refer to these documents to determine their content."

Subsequent to this charge the court made a similar reference to the pleadings and contracts (R. 1298):

> "Various other defensive pleadings have been filed by the parties involved which are also in the form of general denials.
>
> "Gentlemen, the pleadings will be out with you, as I said just now, not as evidence, but for you to read over and get the exact contentions of the respective parties, if you so desire. Now, of course, the Court has not attempted to outline the contents of these contracts to you, but you are instructed to refer to them directly in order to determine for yourselves their contents and the duties and obligations imposed upon the respective parties."

When the entire charges are read, and not portions out of context as referred to by Farnsworth, there is no question but what, as the Circuit Court of Appeals has held, the Court's meaning and intent was to submit to the jury the

pleadings and the contracts in order for the jury to see their contents. Obviously, the charges were not erroneous.

Moreover, the contract between Tri-State and Farnsworth contained technical words and ambiguous terms, such as "pilot house" and "finally approved shop drawings," and there was a great deal of testimony throughout the record relating to the meaning of these terms and the function and purpose of such a pilot house and such shop drawings. In such a situation where the terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact. *Hawkins* v. *Frick-Reid Supply Corporation*, 154 F. 2d 88, 89(4) (5th Cir. 1946); *J. T. Majors & Son, Inc.* v. *Lippert Bros., Inc.*, 263 F. 2d 650, 653, 654 (3) (10th Cir. 1958).

Farnsworth contends that there was no reason for the jury to examine the contents of the contracts. On the other hand, throughout the trial counsel for Farnsworth on numerous occasions read provisions of these contracts to the jury In this setting it has no grounds to complain of the court submitting the contracts to the jury along with the pleadings and other documentary evidence.

3. Legal Argument to Court.

Farnsworth complains and contends that counsel for Tri-State was permitted to argue his legal contentions. At the outset it is important to note that counsel did not read the law. He simply summarized the applicable principles of law pertaining to waiver and to excuse for non-performance of a contract because of failure of payment (R. 1277-1278, 1280). Moreover, counsel's argument was addressed to the court—not the jury—and the colloquy took place

between the court and counsel. Furthermore, Farnsworth does not contend that counsel's argument was an erroneous statement of the law or that it was not applicable to the issues presented in this case. It simply objects to counsel's right to argue the applicable law.

This court is entitled to take judicial knowledge of the custom prevailing in the lower courts of Georgia and in the Federal District Courts of Georgia where counsel for both sides utilized the first portion of their final argument in addressing the court in the presence of the jury and referring to the court at that time the legal principles which counsel contend are involved in the case. This practice follows the procedure outlined in Rule 19 of the Rules of the Superior Court of Georgia codified in the *Georgia Code Annotated* at Section 24-3319 and which practice has been approved by the Supreme Court of Georgia. *Rutledge* v. *Hudson*, 80 Ga. 266, 268; 5 S. E. 93, 95 (4) (1887); *Slaughter* v. *Heath*, 127 Ga. 747, 759; 57 S. E. 69, 75 (8) (1907). Farnsworth had experienced trial counsel of Georgia representing it, who had full opportunity to do the same.

Counsel did not read the law, but if he had, such practice is permissible and not improper. *Michigan Mutual Life Insurance Co.* v. *Oliver*, 256 F. 212 (5) (5th Cir. 1919); cert. den. 250 U. S. 646, 39 S. Ct. 494, 63 L. Ed. 1187.

Moreover, matters pertaining to final argument are largely within the discretion of the trial court. *Franklin* v. *Shelton*, 250 F. 2d 92, 99 (21) (10th Cir. 1957).

In the Federal courts counsel can argue the issues of the case, *the applicable law*, the pertinent evidence and such legitimate inferences as may properly be drawn therefrom. *London Guarantee and Accident Company* v. *Woelfle*, 83 F. 2d 325, 342 (29) (8th Cir. 1936). See also *Tashjian* v. *Boston & Maine R. R.*, 80 F. 2d 320, 321 (1st Cir. 1935).

It has been held to be proper to summarize the law of contributory negligence before the jury in a Federal Employees Liability Act case. *Chicago Great Western Railway Company* v. *Scovel*, 232 F. 2d 952, 957-958 (11), (8th Cir. 1956); cert. den. 352 U. S. 835, 77 S. Ct. 53, 1 L. Ed. 2d 54.

The argument of law to the court was applicable to the issues of the case, was in no way prejudicial or harmful to petitioner, was within the discretion of the trial court, and was in no way improper.

4. Prejudicial Comments.

The additions of the trial court to the requests to charge of Farnsworth speak for themselves and we submit to the court that each of them was correct in every respect and not prejudicial to Farnsworth. Moreover, insofar as any repetition or undue prominence is concerned, the court should bear in mind that Farnsworth requested 23 separate requests to charge whereas the other parties in the case made a total of only 14. Many of Farnsworth's charges, including those referred to by it in its appendix to its petition, were categorical in nature with little qualifying language. To be compared are the charges of the other parties which contain carefully phrased qualifications and primarily point up the factual issues to be considered by the jury. In order to give a fair charge, some interjection by the court to Farnsworth's request was essential.

Farnsworth complains of an alleged approval by the trial judge of the legal contentions stated in Tri-State's closing argument to the jury. The instance referred to took place in a colloquy between counsel and the court regarding the court's prior ruling on the introduction of

evidence relative to evidence on waiver of "written change orders" (R. 110, 124, 1276). However, Farnsworth admits on page 13 of its petition to this court that the trial court "correctly charged the jury" with respect to the waiver of this provision of the contract. How, then, can Farnsworth complain of the approval by the trial court of a legal contention which it admits is correct? Surely, no error has been committed.

B.

No Basis Exists for the Issuance of a Writ of Certiorari.

It is submitted that the foregoing, and particularly the Statement of the Case contained at pages 6 to 12, shows conclusively that the verdict of the jury was a just and proper one, and was demanded by the evidence presented. It is further submitted that there is no basis in law or in fact for the allegations of error contended for by petitioner, that the trial court did not commit error, and that the affirmance of the judgment of the trial court by the United States Court of Appeals for the Fifth Circuit was correct and proper.

Moreover, as we have heretofore pointed out at pages 2 through 5 of this brief under the title *QUESTION PRESENTED*, this case is not a proper case for the granting of a writ of certiorari. This case does not involve principles of general importance to the public nor does it involve a conflict of opinion between Circuit Courts of Appeals. The petitioner is simply requesting review of specific facts in an isolated situation. This case turns on the evaluation of testimony and on the factual determination by the trial court and by the Court of Appeals that

charges given by the trial court were correct statements of principles of law applicable to the factual issues presented. These factual issues have already been considered by both courts adversely to Farnsworth and a writ of certiorari should not issue to review the concurrent findings of fact in this case. *N. L. R. B.* v. *Pittsburg Steamship Company*, 340 U. S. 498, 503, *supra* at 4; *Graver Tank and Manufacturing Company* v. *Linde Air Products Company*, 336 U. S. 271, 275 (2); *supra* at 5; *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393, *supra* at 5.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be denied.

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No. 728

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

R. P. FARNSWORTH & CO., INC.
Petitioner

versus

TRI-STATE CONSTRUCTION COMPANY, et al
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR TRI-STATE CONSTRUCTION COMPANY IN OPPOSITION

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OPINION BELOW

The opinion of the U. S. Court of Appeals for the Fifth Circuit is reported at 271 F. 2d 728.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1959. A petition for a rehearing, timely filed, was denied on December 1, 1959. The petition for a writ of certiorari was filed on February 23, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Petitioner's complaint, boiled down to its essence, is that the trial judge gave conflicting charges to the jury. In order to grant the writ, this Honorable Court must find that the Court of Appeals, by not ordering a reversal because thereof, has thereby ". . . *so far*

departed from the accepted and usual course of judicial proceeding, or *so far sanctioned* such a departure by a lower court, as to call for an exercise of this court's power of supervision."[1]

Now, we submit that there are no special and important reasons[2] nor anything of national importance to the Federal System of Jurisprudence[3] involved in the mere presence of certain conflicts in a charge to a jury and especially is this true where the conflict was produced at petitioner's specific request if not actual demand. The Fifth Circuit in acknowledging the fact there was some conflict went on to point out that respondent's requests to charge correctly stated the law of the case, and that if any conflict was present it was due entirely to petitioner's own conduct which, under the circumstances, estopped it from complaining thereof.[4]

This view of the law is certainly sound and is thoroughly documented by both state and federal authority.[5]

This Honorable Court is thoroughly familiar with its Rule 19 and its many decisions construing its limited area of review. That portion of the rule in question obviously contemplates extreme situations which are not present in this case. There has neither been here a departure nor an approval of a departure, extreme or otherwise, as will more fully appear later in respon-

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[1] Sup. Ct. R. 19 (1) (b) (Italics ours); Pet. Brief, p. 2
[2] Sup. Ct. R. 19 (1)
[3] Rogers v. Missouri Pacific Railroad Co., 352 U.S. 559
[4] 271 F. 2d 728, 731 (1959)
[5] United States v. Wurtsbaugh, 140 F. 2d 534 (5th Cir. 1944); Illinois Central R. Co. v. Griffin, 80 F. 278 at 282 (7th Cir. 1897); Dawson Paper Shell Pecan Co. v. Montezuma Fertilizer Co., 19 Ga. App. 42 [5], 90 S.E. 2d 984 (1916); Alabama Great Southern R. Co. v. Johnson, 140 F. 2d 968 at 970 (5th Cir. 1944); Bryant v. Hall, 238 F. 2d 783 at 788 (5th Cir. 1956); Little Rock & M. R. Co. v. Moseley, 56 F. 1009 (1893)

dent's brief. Further, this Court needs no reminder that it does not grant certiorari to review evidence and discuss specific facts nor cases involving merely unique circumstances, but that the power of certiorari is to be exercised sparingly and only in cases of peculiar gravity and general importance to the public as distinguished from the parties.[6]

STATEMENT

Being unable to agree with or acquiesce in a large number of the statements contained in the petition for a writ of certiorari, we feel compelled, in order that the Court might have a complete and accurate picture before it, to give our version of the case.

This case was instituted by Tri-State Construction Co., (hereinafter called Tri-State) against R. P. Farnsworth & Co., Inc., (hereinafter called Farnsworth) by filing a petition in the U. S. District Court for the Eastern District of Georgia, Savannah Division, seeking the recovery of $146,518.28 for labor and materials furnished by it at Fort Stewart, Georgia. Jurisdiction was based upon diversity.

Briefly, Tri-State contended that Farnsworth had contracted with the United States for the erection of a family housing project consisting of seventy-four multiple-unit dwellings, under which Farnsworth would be paid a total of $6,230,100.00. This contract, dated February 27, 1957, included certain plans and specifications prepared by Government architects under which it was contemplated that the construction

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[6] Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393; National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502; Carter v. Atlanta & Saint Andrews Bay Railway Co., 338 U.S. 430, 437; Rogers v. Missouri Pacific R. Co., 352 U.S. 559.

would be of the conventional, rather than of the prefabricated type, conventional construction meaning that raw materials were to be delivered to the site in piece-meal form, then cut and put together piece by piece so as to fit the specifications, taking into account and making allowances for work to be done by the mechanical trades. This type of construction is entirely different from prefabrication which simply involves doing all the cutting and putting together of the lumber at a distant plant with the finished product then shipped to the site in the form of panels to be erected there.

Subsequently, American Houses, Inc., (hereinafter called American) interested Farnsworth in using American's prefabricated units, and introduced Tri-State as a local contractor experienced in installing these units. The U. S. Corps of Engineers, representing the United States, agreed to the switch-over from conventional to prefabricated construction with the express understanding, however, that in order to compensate for the lack of appropriate plans and specifications, two things would have to be done before the prefabricated materials were cut and put together at American plants and shipped to the site: (a) "Pilot" buildings would have to be manufactured and shipped by American and then erected by Tri-State; (b) Shop drawings would have to be prepared by Farnsworth and then submitted to and approved by the Government showing the Government's representative how prefabrication would accomplish the desired result (R. 254, 302).

On March 18, 1957, Farnsworth and American entered into a contract designated as a "Purchase Order," whereby American agreed to ship the panels to the

job, after they had been prefabricated at its plant, for a total price of $860,178.00 (R. 1464). As of the same date, Farnsworth and Tri-State entered into a contract whereby Tri-State agreed to erect the panels at the site for a price of $191,466.30 (R. 1460). As pointed out by the Court of Appeals in its decision, "One-fifth of the work on the job would be done by Tri-State and American, and the remaining four-fifths by Farnsworth or by other subcontractors.[6] It may be observed that the combined contract price for the work of American and Tri-State was slightly more than one-sixth of Farnsworth's total contract price" (271 F. 2d 728, 730).

Tri-State alleged and proved that the pilot buildings were not closed in during the week of April 22, 1957, as called for in its contract with Farnsworth, because of the failure of Farnsworth's employees to have the foundations ready in time for them (R. 93, 94); that because of this delay, many of the other buildings were shipped to the site before the parties and the mechanical trades had had an opportunity to inspect and check the pilot buildings and report the required changes or ramifications back to American's plants; that when Tri-State was finally able to begin erecting the pilot buildings, Farnsworth requested Tri-State's employees (over whom it had control) to cease erecting pilot buildings and to start erecting these other buildings which had begun to accumulate on the premises (R. 103); that the pilot houses, because of Farnsworth's actions and deficiencies, were never allowed to fulfill their function (R. 259). Tri-State further contended that the shop drawings which were to be prepared by Farnsworth and then submitted to and approved by the Government were never prepared by Farnsworth

nor submitted to or approved by the Government (R. 299-301).

Tri-State alleged and proved that in early May 1957, the whole project, with no pilot houses to perform their function, was thrown completely off schedule and into a state of turmoil (R. 102-104); that prefabricated panels were erected without any cutting having been done at the plants to the panels to allow for the mechanical trades due to the inability of those trades to get in and inspect the pilot buildings which had not been closed-in for them as a result of Farnsworth's actions and deficiencies (R. 103); that the construction, instead of being 100% prefabrication as all the parties had agreed upon was now reverting to conventional construction; that the whole picture had been changed and distorted by the necessity of now doing this cutting and similar work on the premises rather than at American's plants; that representatives of Farnsworth and Tri-State met in early May and modified their written agreement so as to provide that now Tri-State, who had the only carpenters on the job, would undertake all of this work which was not covered by its original contract with Farnsworth, with the express understanding that Farnsworth would pay Tri-State as the items were completed and invoices submitted (R. 126). It was pointed out that this modification of the original contract was confirmed by a letter written by Tri-State's chief representative on the job to Farnsworth's chief representative there (R. 127).

Tri-State also alleged and proved that relying upon this new agreement it went forward with the work called for thereunder; that on September 27, 1957, it presented Farnsworth with its invoice for the work

it had completed under the new agreement; that Farnsworth refused to pay Tri-State anything at all and gave no reason whatever for its refusal, and that Farnsworth knew full well that Tri-State was financially unable to continue to finance this additional work for Farnsworth unless Farnsworth kept its payments on a current basis. As the result of this refusal to pay, Tri-State alleged and proved it was prevented from completing its work under the original contract as well as the work under that contract as modified in early May 1957, and was thereby forced to leave the job; that it could no longer finance Farnsworth's obligations and Farnsworth knew this (R. 432, 433).

The above constitutes the basis of Tri-State's cause of action against Farnsworth. Tri-State did not, as Farnsworth says it did in its petition for writ of certiorari, base its "cause of action on the theory that its abandonment of the work was justified by American's failure to furnish proper materials and to pay certain sums which it owed Tri-State, as well as by petitioner's failure to pay Tri-State for alleged extra work" (Pet. p. 7). Rather, the cause of action was predicated on the theory that Farnsworth's refusal to pay, when due, certain sums of money which it had obligated itself to pay Tri-State under the contract, as modified, constituted a material breach of the contract which, and Farnsworth knew this, prevented complete performance of the contract by Tri-State. This breach by Farnsworth, going to the very heart of the contract since the parties knew that only through timely payments could Tri-State finance all of the extra work it was doing at the behest of Farnsworth, entitled Tri-State to treat the contract as rescinded and thereafter seek a recovery from Farnsworth for

the value of its labor and materials which had been *accepted* by *Farnsworth and for which Farnsworth had been paid in full by the United States.*

After Tri-State filed its pleadings, Farnsworth filed a counterclaim against it and its surety for damages caused by what it alleged to be Tri-State's default. Farnsworth also filed a thirty party action against American and its surety because it contended American had breached its contract with Farnsworth. American then counterclaimed against Farnsworth for unpaid materials and cross-claimed against Tri-State for indemnity for any sums which petitioner might recover from it.

The case proceeded to trial before a jury, and after ten full days of hearing testimony, argument, and instructions by the Court, a verdict was rendered for Tri-State against Farnsworth in the amount of $133,020.80, (which was $13,497.48 less than the amount sued for) and for American against Farnsworth in the amount of $151,142.35 (R. 1395). Motions for judgments notwithstanding the verdict or, in the alternative, for new trials filed by Farnsworth were denied by the District Judge (R. 1414).

On appeal, the Court of Appeals affirmed the judgments of the District Court.

ARGUMENT

A

1—Erroneous and Conflicting Charges

a

Farnsworth urges that its petition for a writ of certiorari should be granted because the trial court gave

in its charge to the jury certain instructions requested by Farnsworth that were in conflict with certain instructions requested by Tri-State which were also given in the Court's charge.

It is felt that it might be helpful to the Court if the circumstances surrounding this alleged error were clarified. In denying Farnsworth's motions for judgments notwithstanding the verdicts or, in the alternative, for new trials, the trial court had this to say about the point now being raised by Farnsworth:

> "As one of its grounds for motion for new trial, the defendant now complains that the Court's charge to the jury embodied two separate and contradictory constructions of the various contracts existing between the parties. It is to this point that the Court now addresses its attention.
>
> "The evidence was closed during the A.M. of Thursday, May 30, 1958. The Court advised counsel that oral arguments were to be made in the afternoon of May 30, 1958, and that the Court would charge the jury on Friday morning, May 31, 1958. The Court then in the absence of the jury, reviewed with respective counsel the various requests to charge that had been submitted to the Court. The Court advised counsel that it intended to charge all of the various requests to charge submitted by counsel. Counsel for plaintiff, Tri-State Construction Company, thereupon stated to the Court that in its opinion certain of the charges requested by defendant Farnsworth placed an erroneous construction upon the contracts in question and argued to the Court that these charges should not be given to the jury. The

Court felt at the time that the point raised by plaintiff's counsel raised a serious question, final decision on which was deferred. Counsel for the respective parties were permitted to orally argue their contentions to the jury during the afternoon of Thursday, May 30, 1958.

"During the evening of May 30, 1958, and after further study of the point raised by plaintiff's counsel with regard to the charge, the Court came to the decision that certain of defendant Farnsworth's charges did place an erroneous construction upon the contracts involved. The Court decided that defendant's requests, specifically Nos. 2, 6, 8, 9, 10, 11, 14, 15 and 20, placed an improper construction upon the contracts and circumstances existing between the parties and should not be given to the jury in charge. A conference was held in the Court's Chambers shortly before 10:00 A.M. on Friday, May 31, 1958, at which time counsel for the defendant, R. P. Farnsworth & Co., Inc., were advised of the Court's final decision with regard to their requests to charge. At this point, counsel for the defendant strenuously objected to the Court's action and invoked the strict application of the following portion of FRCP Rule 51:

> 'At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to

the jury, but the court shall instruct the jury after the arguments are completed . . .'

"In face of defendant's objections, the nature of which were thoroughly reviewed with defendant's counsel, the Court acceded to counsel's request and gave in charge to the jury the defendant's requests numbered 1 through 22.

"After a most thorough consideration of this phase of the case, the Court is convinced that the interpretation placed upon the contracts by the plaintiff, Tri-State Construction Company, and as embodied in their requests to charge correctly states the law of the case. Further, the Court is of the opinion, under the circumstances as outlined above, that the defendant is estopped to complain of any conflict produced by its erroneous interpretation of the law as embodied in its requests to charge and therefore this ground is without substance and merit" (R. 1414-1417).

We think the position of the trial court was well taken. It has long been the law, not only in the state where this case was tried, but also in the majority of other jurisdictions, that there should be no reversal for invited error. In *Dawson Paper Shell Pecan Company v. Montezuma Fertilizer Company*, 19 Ga. App. 42 (5), (90 S.E. 2d 984), it was held:

"When the trial judge, in his general instructions, correctly states the law to the jury, and one of the parties, by a written request, induces the court to charge the contrary of the law, the party making the request will not be heard to say that the charge was misleading, confusing, and prejudicial to his rights. If the two excerpts complained of in

the fifth special ground of the motion for a new trial are confusing, *the request on the part of the plaintiff in error made the confusion*; . . ." [Italics ours]

In *Illinois Central R. Co. v. Griffin*, 80 F. 278 (7th Cir. 1897), Judge Woods, in speaking for the court, stated at page 282:

> "The alleged inconsistencies between instructions given at the request of the plaintiff in error and the charge of the court to the jury do not go to material questions, and if they did there would be no available error, if the court's charge was right. If the court, of its own motion, gives inconsistent charges, there may be an assignment of error upon the one which is wrong, or perhaps on the fact of inconsistency; *but, where the inconsistency is between a proper charge and an erroneous instruction given upon request, the requesting party may not complain.*" [Italics ours]

Again, in *U. S. v. Wurtsbaugh*, 140 F. 2nd 534 (5th Cir. 1944), Judge Hutcheson, speaking for the court, states at page 537:

> "Under the plainest principles, it may not, having invited the direction of the verdict and the entry of the judgment, . . . put the judge in error for doing what it invited him to do."

And in *Bryant v. Hall*, 238 F. 2d 783 (5th Cir. 1956), Circuit Judge Borah, speaking for the Court, stated at page 788:

> "While we think that the court should have refused to give this charge, by reason of the fact that the evidence indubitably shows that appellee

did not blow her horn, appellants are in no position to complain for they invited the court to commit error by requesting it to charge Sec. 68-1635 (b)."

Or, as stated in *Little Rock & M. R. Co. v. Moseley*, 56 F. 1009 (8th Cir. 1893):

"A party will not be heard to complain of an error which was committed at his instance, or to criticize an instruction of a trial court because it took a view of the law or the testimony which the party himself entertained, as shown by his requests for instructions."

Finally, in *Smails v. O'Malley*, 127 F. 2d 410, 414 (8th Cir. 1942), it is held that:

"A party cannot be heard to complain in an appellate court of an error which he invited in the lower court in a civil case. 'Such errors, if any, are to be imputed to the party making the request rather than to the court.'"

As additional authority to the proposition that a party will not be heard to allege errors in instructions which were given at his request by the trial court, we respctfully refer the Court to 4 C. J. Appeal and Error, Sec. 2619, p. 707; 14 R.C.L. 815; *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586; *Matheson v. U. S.*, 227 U. S. 540; 5 C. J. S. Appeal and Error, Secs. 1501-1516, pp. 857-970; *Bryant v. Hall*, 238 F. 2d 783, (5th Cir. 1956).

We do not feel it would be in the interest of a fair administration of justice to permit a party to insist that the trial court submit his written requests to the jury under the penalty of having to declare a mistrial if it didn't do so, and then, if the verdict goes

against him, grant that party a new trial on the ground that his written requests were given.

If the substance of the instructions requested by Farnsworth expressed the correct principles of law to be applied to the controversy, then obviously it would have been error for the trial judge to refuse to give them. On the other hand, if those requests to charge did not contain correct principles of law to apply to the controversy, then just as obviously, Farnsworth should not be allowed to complain because they were given, since the giving of them could not have harmed Farnsworth. The fact that the giving of those requests to charge upon the insistence of Farnsworth might have created confusion should not be allowed to be used as a vehicle by Farnsworth to obtain a reversal, since Farnsworth not only invited the confusion but, in fact, insisted upon it at the risk of a mistrial. The verdict of the jury should be evidence enough of the fact that it was not confused by the Court's giving in charge those requests of Farnsworth, since it ignored them.

Furthermore, it should be remembered that in its complaint and throughout the trial, Tri-State contended that its duties, rights and obligations were fully set out in its subcontract with Farnsworth and that the terms of the subcontract in no way placed Tri-State in the position of guaranteeing the performance of American under the terms of its purchase order with Farnsworth. Farnsworth contended throughout that the three parties had an integrated three-way agreement. Actually, though the interpretation placed on the contracts by Farnsworth was and is erroneous, the error in interpretation and possibly in the charge

is immaterial for the reason that in each of the requests to charge, prepared and submitted by Tri-State, Tri-State's right of recovery was bottomed on an express *or* implied promise to pay *outside the terms of the written contract*. In each instance, Tri-State's claimed right of recovery was conditioned or limited upon the jury's prior finding that Farnsworth was in default and that Tri-State was not in default under the terms of the written contract. Therefore, if the jury found as it was entitled to, and ultimately did, that Farnsworth had breached its contract with Tri-State and that Tri-State was otherwise not in default, then and only then was the jury entitled to determine the value of the services and material that Tri-State had expended in Farnsworth's behalf.

Stated differently, had the jury found that Tri-State was the party in default, then the jury would have been entitled to follow the charges submitted by Farnsworth, practically all of which were related to the written contracts between the parties. We find it difficult to see how Farnsworth can complain when the court adopted its interpretation of the written contracts, however erroneous they might have been, and when the jury would have been entitled to follow the theory advanced by Farnsworth had they *first found* that Farnsworth was not in default in the matter.

As has so often been repeated, the object of all legal investigation is the ascertainment of the truth. If, in fact, the jury found, as it did, that the truth of the matter was that Tri-State spent $133,020.80 of its own money in performing services and furnishing materials for Farnsworth, all of which were accepted by Farnsworth, thereby enabling Farnsworth to get full credit and to collect in full therefore from the United States,

then justice, fairness and equity demanded that Farnsworth pay Tri-State therefor so long as Tri-State was not in default in its contractual obligations to Farnsworth.

As so aptly stated by Judge Soper, in *Ross Engineering Co. v. Pace*, 153 F. 2d 35, 45, (4th Cir. 1946), involving substantially the same situation as here:

> "It appears from this review that the statement in the judge's charge, that A.R.M. [subcontractor] contended that it had an oral agreement with Ross [general contractor] as to the roads, should have been omitted; but we do not think that this error was prejudicial to Ross in the view we take of the legal principles which govern the case. The judge left it to the jury to determine whether in fact there was such an express agreement and stated fully the opposing contention of Ross denying the existence of the agreement and attributing the damage to the delinquency of the contractors; and finally the judge clearly told the jury to find their verdict on this point for Ross if they should conclude that the damage was done without fault of Ross.
>
> "The jury's verdict for $30,400 was necessarily based upon the finding that the damage to the roads was caused by Ross or by persons within its control; and upon this hypothesis, we think that the liability of Ross to A.R.M. is established, whether the case be considered an action at common law or a suit under the Miller Act. Ross was the general contractor in control of the entire project. . . . The result was that the roads had to be reconstructed in order to conform to specifications

and to entitle Ross to compensation under its contract with the United States.

"It follows that a promise to pay for the benefits conferred should be implied. The situation is akin to that which occurs when one accepts goods or services from another who expects payment for them. It is urged upon us that no intention to pay for the roads can be attributed to Ross in this case in the face of its vigorous denial of all liability. See *Baltimore & O. R. v. United States*, 261 U. S. 592, 43 S. Ct. 425, 67 L. Ed. 816. But this attitude rests on the contention that the damage was caused by faulty work and since this view is no longer tenable in the light of the jury's verdict, *the defendant is forced into the field of quasi contracts where the rule is that, irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense for which equitably he ought to pay.* It has been held in a variety of circumstances that when such a situation occurs, a contract to pay is implied in law." [Italics ours]

Since, therefore, Tri-State's requests to charge based its right of recovery on an express or implied promise by Farnsworth to pay for this extra work performed by Tri-State outside the terms of the written subcontract, and since the jury by its verdict necessarily found that the services had been performed and the materials had been furnished by Tri-State for the benefit of Farnsworth and accepted by Farnsworth, the latter should be required to pay their fair value and not be permitted to escape therefrom by invoking as a ground for reversal an alleged erroneous technicality arising from Farnsworth's own creation.

b

We hasten at this juncture to point out to the Court that the excerpts from the trial court's instructions quoted by Farnsworth on page 11 of its petition for a writ of certiorari are quite misleading in that they have been lifted out of context. For example, it is there stated that:

> "In connection with the first ground, the trial court instructed the jury that 'in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials . . . Tri-State would be entitled to recover any such expense from the defendant Farnsworth.'"

At first blush one would naturally conclude that the trial court was placing the ultimate and final responsibility and liability upon Farnsworth for the failure by American to furnish materials. The trial court said no such thing nor did it intend to convey any such meaning. What it did charge the jury was this:

> "Gentlemen of the jury, in the event you should find that Tri-State has incurred additional expense for labor or materials as the sole and direct result of the failure of American Houses to furnish materials as provided for in the contract between American Houses and Farnsworth, I charge you that Tri-State would be entitled to recover any such expense from the defendant Farnsworth, *and in that event Farnsworth in turn would be entitled to recover an equal amount from American Houses*" (R. 1302). [Italics ours]

In the next two excerpts from the Court's charge quoted by petitioner on page 11, it is to be again observed that they have been lifted out of context and, because of that, they do present a distorted picture. It is these two charges which petitioner claims denied it "any recovery from Tri-State if American failed to furnish proper materials or was indebted to Tri-State" (Pet., p. 12).

It should be pointed out here that these two charges, when read in their entirety, show that the Court was addressing itself at the time to the contentions of Tri-State's surety, American Surety Company. We submit that these charges dealt only with the conditions under which Farnsworth or American could recover as co-obligees on the performance bond given by Tri-State. They did not relate to, or have anything whatsoever to do with, whatever right Farnsworth may have had to recover outside of the bond for alleged breaches of the subcontract by Tri-State. This question, and the corresponding question as to the right of Tri-State to recover from Farnsworth was fully covered elsewhere in the charge.

Farnsworth and American were joint obligees in the Tri-State bond and their rights, whatever they were, were joint and had to be asserted jointly (13 C. J. Contracts, Sec. 562, p. 575).

Tri-State could not perform its subcontract unless and until Farnsworth had performed the preliminary work it was supposed to perform and American Houses had furnished the prefabricated materials it was obligated to supply in accordance with the contract documents, and neither of them could recover on the bonds unless both had discharged their obligations so as to make possible performance by Tri-State.

Certainly Farnsworth could not recover on the Tri-State bond if the failure of American to furnish prefabricated materials as called for in its purchase order or of Farnsworth itself to do related work in a workmanlike manner caused or contributed to the failure of Tri-State to complete performance.

Farnsworth contracted to obtain the prefabricated units from American and to furnish them to Tri-State for erection, and as between Farnsworth and Tri-State it was clearly the right and duty of Farnsworth to see that prefabricated units, built to specification in a workmanlike manner, were furnished to Tri-State by American, and Tri-State was entitled to assume that Farnsworth would see that this was done, and unless it was done Farnsworth clearly could not recover on the Tri-State bond.

We submit, therefore, that these charges were sound, but, even if this were not true, they were not prejudicial because they relate only to the conditions upon which Farnsworth or American could recover on the Tri-State bond for breach of the subcontract by Tri-State and the jury found that the subcontract was breached by Farnsworth and not by Tri-State.

The charges complained of obviously had nothing whatsoever to do with the right of Tri-State to recover from Farnsworth and no application whatsoever in the case unless and until the jury determined as a preliminary matter that Tri-State had breached its subcontract and then came to consider the question of liability on the bond.

A verdict in favor of Tri-State and against Farnsworth means that on this basic question the jury found that Farnsworth had, and Tri-State had not, breached

the subcontract, and the charges excepted to, therefore, never became operative with respect to any issue the jury decided or was called upon to decide.

c

In its first statement under this section of its brief, petitioner states: "The second basic element of Tri-State's claim was petitioner's failure to pay for alleged extra work."

As we have already pointed out, it was petitioner's failure to pay for extra work which it had agreed to pay for that constituted the sole basic element, and not the second basic element of Tri-State's cause of action.

Petitioner then complains of the giving by the Court of Tri-State's requested instruction embodying the principles of *quantum meruit*. We fail to see how this could have been prejudicial to Farnsworth since it was one of the principal issues in the case and, as pointed out by the Fourth Circuit's decision in the Ross Engineering Co. case, *supra*, (153 F.2d 35, 45), "it follows that a promise to pay for the benefits conferred should be implied . . . the defendant is forced into the field of quasi contracts where the rule is that, irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense for which equitably he ought to pay."

d

This section repeats the criticisms and complaints previously set forth under subsection a of Section A of the petition, and our arguments in opposition to the position therein taken should not and will not be repeated here.

2—CONTRACT INTERPRETATION BY THE JURY

We feel that the Court of Appeals has adequately covered this exception or criticism in its decision when it stated:

> "It would have been better if the court had omitted the concluding phrase, 'and the duties and obligations imposed upon the respective parties.' The construction of the written contracts was of course, for the court, though factual issues were presented as to the meaning and purpose of certain technical words and ambiguous terms, such as 'pilot house' and 'shop drawings.' The courts meaning and intent were, however, reasonably clear, that is, to submit to the jury the pleadings and the contracts in order for the jury to see their contents. The error in the use of the concluding phrase is not, in our opinion, sufficient ground for setting aside the jury's verdict and the judgments entered thereon" (p. 28-29 Petitions Appendix).

We might point out further that the trial court made a somewhat similar reference to the contracts when it stated:

> "The Court will not attempt to exhaustively review or detail the terms and conditions of the aforementioned contracts. These documents are attached to the pleadings which will be given you at an appropriate time and you, Gentlemen, are invited and instructed to refer to these documents to determine their content" (R. 1282).

Obviously, the trial court was not directing the jury to interpret the agreements, but it was simply putting

the contracts in the same posture as the pleadings and directing the jury to read both the pleadings and the contracts in order to determine their content.

However, even if the court had directed the jury to interpret the provisions of the agreements, the court could have very properly done so. There were several terms used in the contracts and contract documents which did not lend themselves to a definite meaning. For instance, there was a great deal of testimony throughout the record relating to the meaning of the term "pilot house" and the function and purpose of building such a pilot house or building. It was very properly the function of the jury to determine this factual question due to the ambiguity inherent in the use of the term.

In the case of *Hawkins v. Frick-Reid Supply Corporation*, 154 F. 2d 88, 89 (5th Cir. 1946), the court stated the general legal proposition that:

> "While the construction of a contract is ordinarily for the court if the terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact." (Citing authorities)

To the same effect, see the more recent case of *J. T. Majors & Son, Inc. v. Lippert Bros.*, 263 F. 2d 650 (10th Cir. 1958).

3—Legal Argument to Jury

It was for the purpose of making Tri-State's position abundantly clear to the Court that these arguments were presented. Moreover, it should be pointed out that counsel for Tri-State did not "read to the jury from two

law books" as shown in the record at page 1277. When petitioner's counsel made an objection, Tri-State's attorney stated, "Well your Honor, in view of that objection I will simply reiterate what these decisions say or at least I will summarize it." Counsel did not read the law but merely summarized the principles contained in the two volumes. Furthermore, the principles of law were addressed to the court, not the jury, and the colloquy took place between the court and counsel.

The principles of law referred to were illustrative of the legal position taken by Tri-State on the point involved and if the position is sound as we think we have adequately pointed out to the Court previously in this brief, the stating of the principles to the Court could not be error, but even if it were it would be harmless at most.

4—Prejudicial Comments

Here the petitioner complains about certain "interjections" by the trial judge "stating contentions of the opposing parties."

We submit that a reading of the Appendix to Farnsworth's-petition for certiorari, commencing at page 43, will demonstrate that each of the comments by the trial judge was correct in every respect and not prejudicial to Farnsworth.

Furthermore, and insofar as any possible repetition is concerned, it should be pointed out that Farnsworth made a total of twenty-three separate requests to charge to the court. Tri-State made six requests, and American four requests. It was no doubt an effort on the part of the trial judge to render *less repetitious* by

the interjection of qualifying phrases from time to time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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